SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1956

No. 478

WEST POINT WHOLESALE GROCERY COMPANY, APPELLANT,

vs.

THE CITY OF OPELIKA, ALABAMA

ON APPEAL FROM THE COURT OF APPEALS OF THE STATE OF ALABAMA

INDEX

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., FEB. 5, 1957

—3743-2

[fol. 1] [Caption omitted]

IN CIRCUIT COURT OF LEE COUNTY, STATE OF ALABAMA

SUMMONS AND COMPLAINT—Filed December 30, 1953

To any Sheriff of the State of Alabama, Greetings:

You are hereby commanded to summon City of Opelika, Alabama, a Municipal Corporation, organized and existing under the laws of the State of Alabama, to appear in the Circuit Court of Lee County, Alabama, at the usual place of holding the same, within thirty (30) days after the service of a copy of this Summons and Complaint upon it, then and there to answer the Complaint of West Point Wholesale Grocery Company, a corporation.

Witness my hand, this the 30 day of December, 1953.

(Signed) W. O. Brownfield, Clerk.

COMPLAINT

1. The Plaintiff claims of the Defendant, City of Opelika, a municipal corporation organized and existing under the laws of the State of Alabama, the sum of Two Hundred Fifty and 50/100 ($250.50) Dollars, for that during the period, to-wit: January 1st, 1953, to and including the date of the filing of this Complaint, Plaintiff was, and is now, a nonresident of the State of Alabama, being a corporation organized and existing under the laws of the State of Georgia and was, during said time, engaged in the wholesale grocery business, and from time to time, during said period, sold and delivered in interstate commerce certain of its groceries to retail merchants, located and doing business in said City of Opelika, that Plaintiff had no office, storeroom or place of business whatsoever within the State of Alabama, that Plaintiff had no inventory or store of goods within the State of Alabama for the purpose of making deliveries in the State of Alabama or for any other purpose, but that such sales were purely [fol. 2] interstate (Transcript page 2) sales made upon orders given to Plaintiff's salesman and representative

upon his solicitation of such orders from said retail merchants, which orders were transmitted or delivered by said salesman or representative to Plaintiff, at its place of business in the City of West Point, in the State of Georgia, where the orders were accepted, whereupon the groceries so ordered were loaded upon Plaintiff's trucks at its place of business in said City of West Point in the State of Georgia, and unloaded at said retail merchant's place of business at the end of a continuous movement in interstate commierce from Plaintiff's said place of business in the State of Georgia to the purchasers' places of business in the City of Opelika.

Plaintiff further alleges that during said period, to-wit: from January 1st, 1953, to and including the day on which this Complaint is filed, the Defendant, said City of Opelika, had in full force and effect an ordinance, enacted by its Board of Commissioners, which fixed and prescribed a "License Schedule" for said City of Opelika, Alabama, being "An ordinance to fix and prescribe the rates of license or privilege taxes for trades, vocations, professions, and other business conducted within the City of Opelika, Alabama", which ordinance imposed a tax upon wholesale merchants as will appear from said "schedule" which in words and figures, pertinent here, is as follows, to-wit:

"82. MERCHANTS, WHOLESALE:

Where a gross annual business is:

$100,000.00 and less	$ 35.00
Over $100,000.00 and less than $200,000.00	50.00
$200,000.00 and less than $500,000.00	75.00
$500,000.00 and less than $1,000,000.00	100.00
$1,000,000.00 and less than $2,000,000.00	200.00
$2,000,000.00 and over	250.00

And in addition thereto, one-sixteenth (1/16) of one percent (1%) on the first $500,000.00 gross receipts plus one-twentieth (1/20) of one percent (1%) on the next $500,000.00 gross receipts plus one-fortieth (1/40) of one percent (1%) on all gross receipts over one million dollars ($1,000,000.00)."

And Plaintiff further alleges that during said period said Defendant City had in full force and effect an ordinance, enacted by its Board of Commissioners, which fixed and prescribed a "License Schedule", being "An ordinance to fix and prescribe the rates for license or privilege taxes for trades, vocations, professions, and other businesses conducted within the City of Opelika, Alabama", which ordinance imposed a tax upon "Transient or Itinerant" merchants, as will appear from said "Schedule" which in words and figures, pertinent here, is as follows, to-wit:

[fol. 3] "130. TRANSIENT OR ITINERANT:

Each person, firm, corporation or motor transportation company who unloads, delivers, distributes or disposes of any goods, wares, merchandise, or produce in the City of Opelika, Alabama, which said goods, wares, merchandise or produce was transported from a point without the City of Opelika, Alabama, to a point within the City of Opelika, Alabama, Annual Only $100.00"

Plaintiff further alleges that by an ordinance which was enacted by said Board of Commissioners and which became effective on, to-wit: January 21st, 1953, (Transcript page 3) said license schedule was amended, said amendment as advertised and published in Opelika Daily News, a newspaper published in said City; in its issue of January 21st, 1953, being as follows, to-wit:

ORDINANCE No. 103-53

An Ordinance to Amend Ordinance No. 101-53, entitled City License Schedule for 1953.

Be it Ordained by the Board of Commissioners of the City of Opelika, Alabama, as follows:

1. That Ordinance No. 101-53 of the City of Opelika, Alabama, entitled City License Schedule for 1953, be amended by adding thereto sub-section 130(a), as

hereinafter set forth, and by amending sub-section 130 thereof to read as follows:

130. TRANSIENT OR ITINERANT:

Each person, firm, corporation or motor transportation company, except persons, firms or corporations engaged in the wholesale grocery business delivering, distributing or disposing of groceries at wholesale, who unloads, delivers, distributes, or disposes, of any goods, wares, merchandise, or produce in the City of Opelika, Alabama, which said goods, wares, merchandise or produce was transported from a point without the City of Opelika, Alabama, to a point within the City of Opelika, Alabama, Annual Only $100.00.

130(a) TRANSIENT OR ITINERANT-WHOLESALE GROCERS:

Each person, firm, or corporation engaged in the wholesale grocery business who unloads, delivers, distributes or disposes of groceries at wholesale in the City of Opelika, Alabama, which are transported from a point without the City of Opelika, Alabama, to a point within the City of Opelika, Alabama, Annual Only $250.00.

2. This ordinance shall become effective immediately after the publication.

Adopted and Approved this the 20th day of January 1953.

(S.) Ealon M. Lambert, President of the Board of Commissioners of the City of Opelika, Alabama.

Attest:

W. F. Pearson, City Clerk
(Adv. 21)."

Plaintiff further alleges that the above quoted provisions are some of many provisions in said ordinance,

constituting the "City License Schedule" adopted by said City of Opelika.

[fol. 4] Plaintiff further alleges that said City of Opelika, upon the passage of said amended ordinance, demanded that Plaintiff pay said license tax of $250.00 together with an issuance fee of 50c, under penalty of being adjudged in violation of law and subject, as shown by that section of "City License Schedule for 1953" then in force and effect, to fine and imprisonment, which section is in words and figures as follows:

> "d. PENALTIES:
>
> It shall be unlawful for any person, firm, or corporation, to engage in any of the businesses or vocations for which a license may be required without first having procured a license therefor, and any violation hereof shall constitute (Transcript page 4) a criminal offense and shall be punishable by fine not to exceed one hundred ($100.00) dollars for each offense and by imprisonment not to exceed thirty days and not less than the amount of the licenses, either or both at the discretion of the Court trying the same, and each day when such business or vocation is conducted without such license shall constitute a separate offense."

Plaintiff further alleges that it paid said license tax of $250.00, and issuance fee of 50 cents, so demanded by said Defendant City.

Plaintiff further alleges that the aforesaid deliveries and unloadings by it from its trucks were of groceries in interstate commerce at the end of continuous interstate movements from Plaintiff's place of business in the City of West Point in the State of Georgia to the places of business of the purchasing retail merchants in said city of Opelika, Alabama, and that said ordinance of said City of Opelika, Alabama, and the license tax levied and applied to this Plaintiff thereunder constitute an undue burden upon such interstate commerce.

Plaintiff further alleges that the aforesaid ordinance of said City of Opelika, Alabama, and the license tax levied thereunder, are arbitrary, unreasonable and discriminatory,

in that they differentiate between interstate commerce and intrastate commerce, setting up everyone "who unloads, delivers, distributes or disposes of any goods, wares, merchandise or produce in the City of Opelika, Alabama, which said goods, wares, merchandise or produce was transported from a point without the City of Opelika, Alabama, to a point within the City of Opelika, Alabama", as one classification taxed in one way, namely, a flat-sum, and those who unload, deliver, distribute; or dispose of any goods, wares, merchandise, or produce in the City of Opelika, Alabama, other than [fol. 5] goods, wares, merchandise, or produce transported from a point without the City of Opelika, Alabama, to a point within the City of Opelika, Alabama, as a separate classification taxed in a different way, namely, apportioned on the basis of gross receipts.

Plaintiff further alleges that said ordinance of said City of said City (sic) of Opelika, Alabama, and the license taxes levied thereunder, are arbitrary, unreasonable and discriminatory, in that they differentiate among interstate merchants properly in the same class as Plaintiff, said ordinance setting up everyone "engaged in the wholesale grocery business who unloads, delivers, distributes or disposes of groceries at wholesale in the City of Opelika, Alabama, which are transported from a point without the City of Opelika, Alabama, to a point within the City of Opelika, Alabama," as one classification taxed at $250.00 per year, and setting up everyone "except, firms, or corporations engaged in the wholesale grocery business delivering, distributing, or disposing of groceries at wholesale, who unloads, delivers, distributes, or disposes of any goods, wares, merchandise, or produce in the City of Opelika, Alabama, which said goods, wares, merchandise, or produce was transported from a point without the City of Opelika, Alabama, to a point (Transcript page 5) within the City of Opelika, Alabama", as one classification taxed at $250.00 per year, and setting up everyone "except persons, firms, or corporations engaged in the wholesale grocery business delivering, distributing, or disposing of groceries at wholesale, who unloads, delivers, distributes, or disposes of any goods, wares, merchandise, or produce in the City of Opelika, Alabama, which said goods, wares,

merchandise, or produce was transported from a point without the City of Opelika, Alabama, to a point within the City of Opelika, Alabama", as a separate classification taxed at $100.00 per year.

Plaintiff further alleges that the said ordinance of said City of Opelika, Alabama, and the flat-sum license tax levied and applied to this Plaintiff thereunder, are arbitrary, unreasonable and discriminatory, in that they are not uniform in their burden upon those in the class set up by said ordinance of which Plaintiff is a member, said ordinance taxing everyone "engaged in the wholesale grocery business who unloads, delivers, distributes or disposes of groceries at wholesale in the City of Opelika, Alabama, which are transported from a point without the City of Opelika, Alabama, to a point within the City of Opelika, [fol. 6] Alabama", at $250.00 per year without any apportionment upon any basis whatsoever.

Plaintiff further alleges that said ordinance of said City of Opelika, Alabama, and the license tax levied thereunder, as applied to this Plaintiff are arbitrary, unreasonable and discriminatory, creating a burden upon interstate commerce, in that they discriminate between solicitation of business in interstate commerce and solicitation of business in intrastate commerce, said ordinance taxing "each person, firm or corporation engaged in the wholesale grocery business who unloads, delivers, distributes or disposes of groceries at wholesale in the City of Opelika, Alabama, which are transported from a point without the City of Opelika, Alabama, to a point within the City of Opelika, Alabama", at a flat sum of $250.00 per year, while a person, firm, or corporation engaged in the wholesale grocery business who unloads, delivers, distributes or disposes of groceries at wholesale in the City of Opelika, Alabama, other than groceries transported from a point without the City of Opelika, Alabama, to a point within the City of Opelika, Alabama, is taxed on the basis of its gross receipts, and may pay a much smaller tax even though its gross sales are the same as those of the person, firm or corporation engaged in interstate commerce who must pay the flat-sum of $250.00.

Plaintiff further alleges that because of such discrimination as set forth above, the said ordinance of said City

of Opelika, Alabama, and the flat-sum license tax levied and applied to this Plaintiff thereunder, deprived Plaintiff of its property without due process of law. (Transcript page 6)

Plaintiff further alleges that for all of the facts and reasons hereinabove set forth said ordinance of said City of Opelika, Alabama, and the license tax levied thereunder, violate and are contrary and repugnant to the Constitution of the United States and the Constitution of Alabama, and in particular Article I, Section 8, Clause 3, and Article IV, Section 2 of the Coustitution of the United States, the Fourteenth Amendment to the Constitution of the United States, and Sections 1 and 35 of the Constitution of Alabama all of which results in said ordinance and tax being illegal and void.

Plaintiff further alleges that on or about February 15, 1953, it paid to said City of Opelika, the sum of $250.00 and an issuance fee of 50 cents demanded and exacted of it under [fol. 7] and by virtue of said ordinance, namely: License. Schedule 130(a), and Plaintiff avers that said sums of $250.00 and 50 cents were paid by Plaintiff to said Defendant City of Opelika, under mistake of law or fact and that said City of Opelika, now retains the same, and Plaintiff therefore claims of said Defendant City of Opelika the sum of $250.50 for money on, to-wit: February 15th, 1953, had and received by said Defendant City of Opelika, which sum of money, to-wit: $250.50, with the interest thereon, is still unpaid.

(Signed) Denson & Denson, Yetta G. Samford, Jr.,
Attorneys for Plaintiff.

I, Ealon M. Lambert, as President of the Board of Commissioners of City of Opelika, Alabama, do hereby accept service of a copy of the foregoing Summons and Complaint and waiver (sic) other or further service.

This December 29th, 1953.

(Signed) Ealon M. Lambert, As President of the Board of Commissioners, aforesaid.

Filed in office, this 30 day of Dec. 1953.

IN CIRCUIT COURT OF LEE COUNTY
STATE OF ALABAMA

DEFENDANT'S DEMURRER TO PLAINTIFF'S COMPLAINT—Filed Dec. 31, 1952

Now comes the defendant, City of Opelika, Alabama, a municipal corporation organized and existing under the laws of the State of Alabama, by its attorneys, in the above styled cause, and demurs to the plaintiff's complaint, and as grounds of demurrer assigns the following, separately and severally, to-wit:

1. The allegations of the complaint state no cause of action against the defendant.

2. The complaint contains allegations which are contradictory of each other and cause the complaint to be vague and not sufficiently clear to apprise the defendant (Transcript page 7) of what it must defend against, in the following respect, to-wit: it is alleged in the complaint, in substance, that during the period from January 1st, 1953, to and including the day on which the complaint is filed, that the defendant had in full force and effect an ordinance, enacted by its Board of Commissioners, which fixed and prescribed a "License Schedule" for said City of Opelika, and which ordinance imposed a tax "Transient or Itiner- [fol. 8] ant" merchants, in words and figures as follows:

"130. TRANSIENT OR ITINERANT:

Each person, firm, corporation or motor transportation company who unloads, delivers, distributes or disposes of any goods, wares, merchandise, or produce in the City of Opelika, Alabama, which said goods, wares, merchandise or produce was transported from a point without the City of Opelika, Alabama to a point within the City of Opelika, Alabama, Annual Only	100.00

whereas, it is also alleged in the complaint that on January 21, 1953 said license schedule was amended, so as to cause Section 130 to read as follows:

"130. TRANSIENT OR ITINERANT:

Each person, firm, corporation or motor transportation company, except persons, firms or corporations engaged in the wholesale grocery business delivering, distributing or disposing of groceries at wholesale, who unloads, delivers, distributes, or disposes, of any goods, wares, merchandise, or produce in the City of Opelika, Alabama, which said goods, wares, merchandise or produce was transported from a point without the City of Opelika, Alabama, to a point within the City of Opelika, Alabama, Annual Only $100.00

3. The allegations in the plaintiff's complaint that "the deliveries and unloadings by it from its grucks were of groceries in interstate commerce at the end of continuous interstate movements from Plaintiff's place of business in the City of Columbus in the State of Georgia to the places of business of the purchasing retail merchants in said City of Opelika, Alabama, and that said ordinance of said City of Opelika, Alabama, and the license tax levied and applied to this Plaintiff thereunder constitute an undue burden upon such interstate commerce", is a mere conclusion of the pleader.

4. It appears from the plaintiff's complaint that the plaintiff is seeking to recover the amount paid by it to defendant as a license, under certain provisions of defendant's License Schedule for 1953, on the ground that the provisions of the said License Schedule under which plaintiff paid the money to defendant, imposed an undue burden upon interstate commerce, whereas, it affirmatively appears from the allegations in the complaint that the acts done by plaintiffs, and the business engaged in by the plaintiff, for which plaintiff paid the license fee sought to be recovered,

constitute intrastate commerce and not interstate commerce.

5. For aught appears from the plaintiff's complaint, the amount of the license provided and imposed upon the plaintiff by the sections of the defendant's City License Schedule for 1953, mentioned in the complaint, was not in excess [fol. 9] of the license fee for any other exhibition, trade, business or occupation of the (Transcript page 8) same class.

6. The plaintiff's complaint seeks to recover from defendant a certain sum of money alleged to have been paid by defendant as a license fee or tax for 1953 under defendant's City License Schedule for 1953, and alleges that the provisions of the License Schedule or ordinance, under which plaintiff so paid such money, are illegal and void in that same are arbitrary, unreasonable and discriminatory, whereas, for aught that appears from the allegations in the complaint the ordinance in question does not impose an undue burden upon interstate commerce, designates a reasonable basis for classification, and that the levy applies equally to all within the same class and imposes a like tax upon all who engage in the vocation or who may exercise the privilege tax.

7. The complaint contains many conclusions of the pleader.

(Signed) McKee & Maye, Attorneys for Defendant.

Filed this 31st day of December, 1953.

In Circuit Court of Lee County

Judgment Sustaining Defendant's Demurrer to Complaint and Judgment Entering a Non-suit—June 13, 1954

This cause coming on to be heard is submitted to the Court upon the demurrer of the defendant to the complaint.

Upon consideration, the Court is of the opinion that the demurrer of the defendant filed to the complaint in this cause is well taken and ought to be sustained.

It is, therefore, considered, ordered and adjudged by the court that the demurrer of the defendant filed to the complaint in this cause be and the same is hereby sustained.

The Plaintiff thereupon reserved an exception to the ruling of the Court, and thereupon moved for a non-suit and Plaintiff now takes a non-suit on account of said adverse ruling of the Court, and it is, therefore, further considered, ordered and adjudged by the Court that a non-suit be and the same is hereby entered in this cause, and that the defendant go hence and have and recover of the plaintiff all costs in this behalf, expended, for which let execution issue.

Done this the 13th day of June, 1954.

[fols. 10-11] (Signed) Will O. Walton, Judge.

Filed in office, this 15 day of June 1954.

In Circuit Court of Lee County

Notice of Appeal and Security for Costs of Appeal—Filed June 22, 1954

Comes now the plaintiff in the above styled cause and hereby appeals to the Court of Appeals of Alabama from the final judgment in the Circuit Court of Lee County, Alabama, At Law, rendered in the above styled cause on the 14th day of June, 1954.

(Signed) Denson & Denson, Yetta G. Samford, Jr., Attorneys for said Plaintiff.

Filed this the 22nd day of June, 1954.

I hereby acknowledge myself security for costs for the above and foregoing appeal.

(Signed) N. D. Denson.

The foregoing security for costs of said appeal, taken, approved and filed, this 22nd day of June, 1954.

(Signed) W. O. Brownfield, Clerk.

Citation in usual form showing service on Carl Maye omitted in printing.

[fol. 12] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 13] IN THE COURT OF APPEALS OF THE STATE OF ALABAMA, FIFTH DIVISION

WEST POINT WHOLESALE GROCERY COMPANY, a Corporation, Appellant,

vs.

CITY OF OPELIKA, ALABAMA, a Municipal Corporation, Organized and Existing Under the Laws of The State of Alabama; Appellee

ASSIGNMENTS OF ERROR

Now comes the Appellant, Plaintiff in the cause below, and shows unto the Court that manifest error has been committed on the trial of this cause in the Court below, to its great damage, and as grounds of error, assigns the following:

1. The Court erred in sustaining the Defendant's demurrer to the complaint of the Appellant. (See Transcript, page 8).

2. The Court erred in not overruling Defendant's demurrer to Appellant's complaint. (See Transcript, page 8).

3. The Court erred in rendering judgment for the Defendant in the cause below on the pleadings. (See Transcript, page 8).

4. The Court erred in rendering its judgment dated June 14, 1954. (See Transcript, page 8).

5. The Court erred in holding that the complaint was insufficient as against the grounds of demurrer assigned to it by the Defendant. (See Transcript, page 8.)

(Signed) Denson & Denson, Yetta G. Samford, Jr., Attorneys for Appellant.

There is no error in the record.

(Signed) J. Arch McKee, Attorney for Appellee.

[fol. 14] IN THE COURT OF APPEALS OF ALABAMA

WEST POINT WHOLESALE GROCERY COMPANY

v.

CITY OF OPELIKA

Appeal from Lee Circuit Court

JUDGMENT—February 21, 1956

Come the parties by attorneys, and the record and matters therein assigned for errors, being submitted on briefs and duly examined and understood by the court, it is considered that in the record and proceedings of the Circuit Court there is no error. It is therefore considered that the judgment of the Circuit Court be in all things affirmed. It is also considered that the Appellant and N. D. Denson, surety on the appeal bond, pay the costs of appeal of this Court and of the Circuit Court.

[fol. 15] IN THE COURT OF APPEALS OF ALABAMA

OPINION

PRICE, Judge:

This suit was brought by appellant, West Point Wholesale Grocery Company, a corporation, seeking to recover monies paid as license fees under an ordinance of the City of Opelika.

Defendant's demurrers to the complaint were sustained and plaintiff took a non-suit and perfected this appeal.

The complaint alleges:

(The complaint is here set out, ante pages 1-7.)

The legality of the tax provided for under quoted Section 130(a) of the ordinance is challenged on the ground (1) that it imposes an undue burden on interstate commerce in violation of Article I, Section 8, Clause 3 of the Federal Constitution, and (2) that it is arbitrary, unreasonable and discriminatory in that it differentiates between interstate

and intrastate commerce; differentiates between interstate merchants properly in the same class as appellant, because that said classification 130(a) fixes a license fee of $250.00 while classification 130 fixes a fee of $100.00; a flat sum license tax is levied without regard to the amount of business each year; discriminates between itinerant wholesale grocery merchants and local wholesale merchants in that the local merchants are taxed on a graduated gross receipts basis while itinerant wholesale grocers are required to pay a flat-sum license.

The ordinance is essentially identical with those previously considered and held valid in *Sanford v. City of Clanton*, 31 Ala. App. 253, 15 So. 2d 303, cert. den. 244 Ala. 671, 15 So. 2d 309; *Sanford Service Company v. City of Andalusia*, 36 Ala. App. 74, 55 So. 2d 854 cert. den. 256 Ala. 507, 55 So. 2d 856; *City of Enterprise v. Fleming*, 240 Ala. 460, 199 So. 691, 692.

The ordinance applies equally to deliberies of wholesale groceries in the City of Opelika, regardless of whether the transportation began within or without the State, therefore, defendant's contention that it differentiates between intrastate and interstate commerce is without merit. *Sanford v. City of Clanton*, supra; *Sanford Service Co. v. City of Andalusia*, supra.

The basis of classification is a reasonable one and applies equally to all within the class, *City of Enterprise v. Fleming*, supra; *Woco Pep Co. of Montgomery v. City of Montgom-*
[fol. 16] *ery*, 219 Ala. 73, 121 So. 64; *American Bakeries Co. v. City of Huntsville*, 232 Ala. 612, 168 So. 880, and it is not discriminatory because a different tax was required of itinerant persons, unloading, deliбering, distributing or disposing of goods, wares, merchandise, or produce, other than wholesale groceries.

There is no merit in appellant's contention that the tax is dicriminatory because it imposes upon the local wholesale merchant a graduated scale gross receipts tax for the privilege of engaging in local business, while appellant must pay a fixed-sum license tax. "It is well settled that a schedule of licenses may be prescribed for an itinerant person, firm or corporation different from that prescribed for one having an established place of business within the munici-

pality." *American Bakeries v. City of Opelika*, 229 Ala. 388, 157 So. 206; *American Bakeries Co. v. City of Huntsville*, 232 Ala. 612, 168 So. 880.

Likewise, we find no merit in appellant's contention that all fixed-sum license taxes necessarily discriminate against interstate comerce. As was said by Judge Simpson in *Sanford v. City of Clanton*, supra "* * *" the principle has been narrowly limited to fixed-sum license taxes imposed on the business of soliciting orders for purchase of goods to be shipped interstate".

We are of the opinion the complaint does not allege sufficient facts to support the conclusions of the pleader as to the charge of unlawful discrimination against appellant or to show that the requirement that appellant pay the license fees constitutes an illegal burden on interstate commerce. The demurrer was properly sustained.

The judgment of the circut court is affirmed.

Affirmed.

IN THE COURT OF APPEALS OF ALABAMA

APPLICATION FOR REHEARING—Filed March 2, 1956

Comes now West Point Wholesale Grocery Company, Appellant in the above styled cause, by its attorneys, and moves this Honorable Court to grant it a rehearing in this cause and to set aside, annul, and hold for naught its judgment heretofore rendered on February 21st, 1956, affirming the judgment of the Circuit Court of Lee County, Alabama, in favor of Appellee and against this Appellant.

(Signed) Denson & Denson, Yetta G. Samford, Jr.,

Attorneys for Appellant.

[fols. 17-18] IN THE COURT OF APPEALS OF ALABAMA

ORDER OVERRULING APPLICATION FOR REHEARING—April 3, 1956

It is ordered that the application for rehearing be and the same is hereby overruled.

[fol. 19] IN THE SUPREME COURT OF ALABAMA

WEST POINT WHOLESALE GROCERY COMPANY, Plaintiff

vs.

CITY OF OPELIKA, ALABAMA, a Municipal Corporation, Appellee

PETITION FOR WRIT OF CERTIORARI—Filed April 10, 1956

To the Honorable Chief Justice and Associate Justices of the Supreme Court of Alabama:

Your Petitioner, West Point Wholesale Grocery Company, a Corporation, organized and existing under the laws of the State of Georgia, and having its principal place of business in the City of West Point, Troup County therein, hereby respectfully petitions this Honorable Court to review, revise, reverse, hold for naught and determine the judgment rendered by the Court of Appeals of Alabama on the 21st day of February, 1956, in that certain cause on appeal in that Court, numbered and styled 5th Div. 548, West Point Wholesale Grocery Company, a Corporation, Appellant, vs. City of Opelika, Alabama, a Municipal Corporation, on appeal from Lee Circuit Court, which said judgment of said Court of Appeals affirmed the judgment of the Circuit Court of Lee County in favor of Appellee and against your Petitioner.

Your Petitioner further shows that, within the time allowed by law, it duly filed its application for rehearing in said Court of Appeals, raising the points hereinafter set out, and that said application for rehearing was decided adversely to Your Petitioner by said Court of Appeals on the 3rd day of April, 1956.

[fol. 20] Petitioner further shows that it was, at times pertinent here, engaged in the wholesale grocery business in West Point, Georgia, and was selling and delivering groceries to retail merchants in Opelika on orders taken therefor by its salesmen and which were transmitted by them to its home office in West Point, Georgia, from which point deliveries were later made by truck to Opelika merchants. On February 15, 1953, said City exacted from Petitioner, as a license fee or tax for carrying on its business in Opelika,

the sum of $250.00, and 50 cents for issuance of license, under ordinances which it claimed were in full force and effect, and due to be paid by Petitioner to do business in Opelika, and Petitioner further shows that it believed and still believes that said sums were wrongfully exacted of it and that such payment was made under mistake of law or fact, and that said ordinances were then null and void, being contrary to the provisions of the Constitution of the United States and the State of Alabama, and that Petitioner heretofore filed its suit in said Lee Circuit Court to recover said sums, alleging in its Complaint, substantially, that said license fee or tax was wrong, illegal and invalid for that it imposed an undue burden on interstate commerce in violation of Article 1, Section 8, Clause 3 of the Federal Constitution, that said ordinances were arbitrary, unreasonable and discriminatory in that they differentiated between interstate and intrastate commerce unreasonably, that they differentiated between interstate merchants in the same class in that certain of said ordinances fixed a license fee of $250.00, while others fixed a fee of $100.00, that said ordinances fixed a flat sum license fee, applying to Petitioner, without regard to the amount of business done in Opelika by Petitioner, that said ordinances discriminated between itinerant wholesale merchants and local wholesale merchants, in that local merchants were taxed on a graduated gross receipts basis, while itinerant wholesale grocers were required to pay a flat-sum license.

[fol. 21] The Appellee filed its demurrer to Petitioner's Complaint, the Trial Court sustained the same and because of such adverse ruling, Petitioner was forced to, and took a non-suit, appealing to said Court of Appeals, where, as heretofore stated, that Court affirmed the rulings of the Trial Court on February 15th, 1956, and then overruled Your Petitioner's application for a rehearing.

Petitioner's contentions and issues raised by Petitioner's assignments of error in the Court of Appeals, are the insufficiency of the grounds of demurrer to call for consideration of same by the Court and the sufficiency of the allegations of the Complaint to present a case for Petitioner, showing that the ordinances in question are wrong, illegal and invalid as being contrary to the Constitution and laws of the United Staes and of the State of Alabama.

Briefs filed by the parties in the Court of Appeals were largely directed to these points.

The Court of Appeals held that the demurrer was sufficient to call for Court's consideration and affirmed the Trial Court's judgment, which sustained said demurrer and also sustained the Trial Court's ruling and held that the Complaint was insufficient to present and show that the ordinances in question were illegal and void as being unreasonable and illegally discriminatory as against Petitioner and otherwise objectionable as set forth in Petitioner's Complaint, and particularly erroneously held, as follows:

> "We are of the opinion the Complaint does not allege sufficient facts to support the conclusions of the pleader as to the charge of unlawful discrimination against Appellant or to show that the requirement that Appellant pay the license fee constitutes an illegal burden on interstate commerce. The demurrer was properly sustained."

Your Petitioner submits and shows that the Court of Appeals erred in affirming and failing to reverse the judgment of said Circuit Court, in the following ways, to-wit:

The Court of Appeals erred in holding:

1. That the demurrer filed by Appellee to Petitioner's Complaint in the Circuit Court was sufficient in substance [fol. 22] to call forth the consideration of the Court thereof.

2. That Petitioner's Complaint did not allege sufficient facts to support Petitioner's conclusions as to the charge of unlawful discrimination against Petitioner.

3. That Petitioner's Complaint did not allege sufficient facts to show that the requirement that Petitioner pay the license fee constituted an illegal burden on interstate commerce.

4. That the rulings and judgment of the Trial Court were correct and in affirming same.

5. The Court of Appeals erred in affirming and in failing to reverse the rulings and judgment of the Trial Court.

6. The Court of Appeals erred in rendering judgment for Appellee.

Wherefore, Your Petitioner respectfully prays that a Writ of Certiorari be issued out of and under the seal of this Court, directed to said Court of Appeals, commanding and requiring said Court to certify and send to this Court on a day certain to be designated by this Court, a full and complete transcript of the record and all proceedings of said Court of Appeals, in the cause numbered and entitled as aforesaid, to the end that this cause may be reviewed and determined by this Honorable Court as provided by law and the rules and practice of this Honorable Court, and that this Court thereupon proceed to review and correct the errors complained of, and to reverse the judgment of said Court of Appeals, or render such judgment as said Court should have rendered.

Petitioner further prays that this Honorable Court suggest and require said Court of Appeals to stay or recall its certificate of affirmance of said cause during the pendency of this petition.

And Petitioner prays for such other, further and additional relief in the premises as to this Court may seem appropriate and to which it may be entitled, and Your Petitioner will ever pray, etc.

[fol. 23] Submitted herewith is a Brief in support of this Petition.

Respectfully Submitted, (S.) Denson & Denson, Yetta G. Samford, Jr., Attorneys for Petitioner.

Duly sworn to by N. D. Denson jurat omitted in printing.

I hereby certify that I delivered a copy of the foregoing Petition to Messrs. McKee & Mayo, Attorneys of record for Appellee in this cause, on the 9th day of April, 1956.

(S.) N. D. Denson, Of Counsel for Petitioner.

[fol. 24] IN THE SUPREME COURT OF ALABAMA

[Title Omitted]

ORDER DENYING WRIT OF CERTIORARI AND DISMISSING PETITION —May 24, 1956

Comes the Petitioner, West Point Wholesale Grocery Company, a Corporation, by Attorneys, and the Petition for Writ of Certiorari to the Court of Appeals being submitted on briefs and duly examined and understood by the Court,

It is considered and ordered that the Writ of Certiorari to the Court of Appeals be and the same is hereby denied, and that the Petition be and the same is hereby dismissed at the cost of the Petitioner, West Point Wholesale Grocery Company, a Corporation, for which costs let execution issue accordingly.

[Writ Denied: Petition Dismissed] (No Opinion): Merrill, J.

Livingston, C. J., Lawson and Stakely, JJ., concur

[fol. 25] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 26] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 27] IN THE ALABAMA COURT OF APPEALS

WEST POINT WHOLESALE GROCERY COMPANY

v.

CITY OF OPELIKA

Appeal from Lee Circuit Court

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES—August 9, 1956

1. Notice is hereby given that West Point Wholesale Grocery Company, the appellant above named, hereby appeals to the Supreme Court of the United States from the final

judgment of the Alabama Court of Appeals, 5th Division, entered in this action on February 21, 1956, which judgment affirmed a judgment of the Lee Circuit Court of Alabama sustaining demurrers to appellant's complaint. (A petition for writ of certiorari was applied for to the Supreme Court of Alabama within the time permitted by Alabama law, and the Supreme Court of Alabama on May 24, 1956, denied said petition for certiorari.)

This appeal is taken pursuant to 28 U.S.C., Section 1257 (2).

II. The Clerk will please prepare a transcript of the record in this cause for transmission to the Clerk of the Supreme Court of the United States and include in said transcript the following:

1. Summons and complaint.
2. Demurrers to complaint.
3. Judgment sustaining demurrers.
4. Judgment entering non-suit.
5. Judgment of Alabama Court of Appeals affirming the [fol. 28] judgment of the Lee Circuit Court of Alabama.
6. Opinion of the Alabama Court of Appeals.
7. Order of the Supreme Court of Alabama denying certiorari.

III. The following questions are presented by this appeal.

1. Whether Section 130(a) (which Section was captioned "Transient or Itinerant") of Ordinance No. 103-53 of the City of Opelika, Alabama (which Ordinance was captioned "City License Schedule for 1953"), levying a $250.00 annual flat sum license tax for 1953 upon each person, firm or corporation which unloaded or delivered groceries at wholesale in the City of Opelika, Alabama, which groceries were "transported from a point *without*—Opelika," violated the Commerce Clause of the United States Constitution (U. S. Const. art. I, Section 8, cl. 3), and the Equal Protection and Due Process clauses of the United States Constitution (U. S. Const. amend. XIV, Section 1) as applied to appellant; during all of 1953 appellant was a Georgia corporation engaged in the wholesale grocery business, its place of business was in the State of Georgia, all of its deliveries of groceries in Opelika were pursuant to orders accepted in

Georgia and were at the end of a continuous interstate movement from Georgia to Opelika, Alabama; and appellant had no office, storeroom or place of business whatsoever within the State of Alabama and had no inventory or store of goods within the State of Alabama for the purpose of making deliveries in the State of Alabama, or for any other purpose.

2. Whether the above Section 130(a) as so applied violated the said Commerce, Equal Protection and Due Process clauses, particularly since another provision of the same Ordinance (being Section 82 thereof) levied an annual license tax upon each wholesale merchant which unloaded or delivered groceries at wholesale in the City of Opelika, Alabama, which groceries were "transported from a point *within*—Opelika," at a graduated amount apportioned according to the gross receipts derived from such local business.

3. Whether the foregoing Section 130(a) as so applied [fol. 29] violated the said Equal Protection and Due Process clauses particularly since another section of the same Ordinance (being Section 130 thereof) levied an annual license tax of only $100.00 upon itinerant grocers conducting the same operation as appellant except for the selling of such groceries at retail rather than at wholesale.

(Signed) M. R. Schlesinger, Attorney for the West Point Wholesale Grocery Company, Appellant.

Of Counsel: N. D. Denson, Opelika, Alabama. Tom B. Slade, Columbus, Georgia.

PROOF OF SERVICE (omitted in Printing)

[fol. 30] Clerk's Certificate to foregoing paper omitted in printing.

[fol. 31] SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1956

No. 478

WEST POINT WHOLESALE GROCERY COMPANY, Appellant

vs.

THE CITY OF OPELIKA, ALABAMA

ORDER NOTING PROBABLE JURISDICTION—December 3, 1956

Appeal from the Court of Appeals of the State of Alabama.

The statement of jurisdiction in this case having been submitted and considered by the Court, probable jurisdiction is noted and the case is transferred to the summary calendar.

December 3, 1956.

(3743-2)

In the Supreme Court of the United States

OCTOBER TERM, 1956.

No. 478

WEST POINT WHOLESALE GROCERY COMPANY,
Appellant,

vs.

THE CITY OF OPELIKA, ALABAMA,
Appellee.

APPEAL FROM THE COURT OF APPEALS OF ALABAMA.

JURISDICTIONAL STATEMENT.

M. R. SCHLESINGER,
1700 N. B. C. Building,
Cleveland, Ohio,
Attorney for Appellant.

Of Counsel:
N. D. DENSON,
Opelika, Alabama,
TOM B. SLADE,
Columbus, Georgia.

INDEX.

TABLE OF AUTHORITIES.

Cases.

Constitution.

Statute.

Ordinances of the City of Opelika, Alabama.

In the Supreme Court of the United States

OCTOBER TERM, 1956.

No.

WEST POINT WHOLESALE GROCERY COMPANY,

Appellant,

vs.

THE CITY OF OPELIKA, ALABAMA,

Appellee.

APPEAL FROM THE COURT OF APPEALS OF ALABAMA.

JURISDICTIONAL STATEMENT.

REPORTS OF OPINIONS BELOW.

The Supreme Court of Alabama did not render an opinion in this case. The opinion of the Court of Appeals of Alabama is reported in 87 So. 2d 667 (1956). A copy of that opinion is attached hereto as Appendix "A." The Lee Circuit Court of Alabama, the court of first instance, did not render an opinion in this case.

JURISDICTIONAL GROUNDS.

1. This is an appeal from a decision of the Court of Appeals of Alabama. The appellant herein brought suit against The City of Opelika, Alabama, to recover monies paid to that City pursuant to Section 130(a) of Ordinance

No. 101-53 as amended by Ordinance No. 103-53 on the ground that Section 130(a) was unconstitutional as being in conflict with the provisions of both the Federal and Alabama Constitutions. The ordinance in controversy levies a flat sum license tax on persons engaged in the wholesale grocery business who dispose of groceries at wholesale in Opelika which groceries are transported from a point without Opelika.

2. The decision of the Court of Appeals of Alabama was handed down on the 21st day of February, 1956. A motion for rehearing was denied by the Court of Appeals on April 3, 1956. Within the time permitted by Alabama law appellant petitioned for a writ of certiorari to the Supreme Court of Alabama. The Supreme Court of Alabama denied the writ of certiorari and dismissed the petition on May 24, 1956. A Notice of Appeal to this Court was filed by appellant with the Clerk of the Court of Appeals of Alabama on August 9, 1956.

3. The jurisdiction of this Court upon appeal is conferred by 28 U. S. C. A. § 1257(2). Appellant challenges the validity of an ordinance of the City of Opelika, Alabama, "a statute of a State" within the meaning of 28 U. S. C. A. § 1257(2), on the ground that as applied to appellant's activities it is repugnant to the Constitution of the United States, and the decision of the highest State court to which an appeal could have been taken was in favor of validity.

4. Cases believed to sustain the jurisdiction of this Court on appeal include:

King Manufacturing Co. v. City Council of Augusta, 277 U. S. 100 (1928); *Jamison v. Texas*, 318 U. S. 413

(1943); *Independent Warehouses, Inc. v. Scheele*, 331 U. S. 70 (1947); *Poulos v. New Hampshire*, 345 U. S. 395 (1953); *Michigan-Wisconsin Pipe Line Co. v. Calvert*, 347 U. S. 157 (1954); *Sullivan v. Texas*, 207 U. S. 416 (1908); *American Railway Express Co. v. Levee*, 263 U. S. 19 (1923); *Western Union Telegraph Co. v. Priester*, 276 U. S. 252 (1928); *Western Union Telegraph Co. v. Crovo*, 220 U. S. 364 (1911); *Norfolk & Suburban Turnpike Co. v. Commonwealth of Virginia*, 225 U. S. 264 (1912).

5. Section 130(a) of Ordinance No. 101-53 as amended by Ordinance No. 103-53, the ordinance involved, is set out below. This ordinance is not found in any official reports.

> "130(a) TRANSIENT OR ITINER. WHOLESALE GROCERS: Each person, firm or corporation engaged in the wholesale grocery business who unloads, delivers, distributes or disposes of groceries at wholesale in the City of Opelika, Alabama which are transported from a point without the City of Opelika, Alabama to a point within the City of Opelika, Alabama, Annual Only ..... $250.00."

Attached hereto as Appendix "B" are Sections d, 82, 130 and 130(a) of Ordinance No. 101-53 as amended by Ordinance No. 103-53. Section d provides penalties for non-compliance with the ordinance. Section 82 provides for the taxation of Opelika wholesale merchants. Section 130 provides for the taxation of persons disposing of goods other than wholesale grocery products in Opelika which are transported from a point without Opelika. These three sections, while not directly attacked in this appeal, are necessary for a complete consideration of the issues.

QUESTIONS PRESENTED.

The following questions are presented by this appeal:

1. Whether Section 130(a) of Ordinance No 103-53 of the City of Opelika, Alabama, levying a $250.00 annual flat sum license tax for 1953 upon each person, firm or corporation which unloaded or delivered groceries at wholesale in the City of Opelika, Alabama, which groceries were transported from a point *without* Opelika, violated the Commerce Clause of the United States Constitution (U. S. Const. art. I, § 8, cl. 3), and the Equal Protection and Due Process Clauses of the United States Constitution (U. S. Const. amend. XIV, § 1) as applied to appellant.

2. Whether the above Section 130(a) as so applied violated the said Commerce, Equal Protection and Due Process Clauses, particularly since another provision of the same Ordinance (being Section 82 thereof) levied an annual license tax upon each wholesale merchant which unloaded or delivered groceries at wholesale in the City of Opelika, Alabama, which groceries were transported from a point *within* Opelika, at a graduated amount apportioned according to the gross receipts derived from such local business.

3. Whether the foregoing Section 130(a) as so applied violated the said Equal Protection and Due Process Clauses particularly since another section of the same Ordinance (being section 130 thereof) levied an annual license tax of only $100.00 upon itinerant merchants conducting the same operation as appellant except for the selling of merchandise at retail rather than at wholesale.

STATEMENT OF THE CASE.

This is a suit brought against the City of Opelika, Alabama, to recover monies paid to the City pursuant to the provisions of Section 130(a) of Ordinance No. 101-53 as amended by Ordinance No. 103-53 on the ground that Section 130(a) is in conflict with the United States Constitution. Appellant was required to pay the flat sum license tax levied by this section together with an issuance fee of 50¢ under penalty of being adjudged in violation of the law and subject to a fine and imprisonment as is provided in Section d of Ordinance 101-53 (App. "B").

Without filing an answer or other responsive pleading the appellee demurred to the complaint, which demurrer was sustained. A non-suit was entered and an appeal taken to the Alabama Court of Appeals. The Alabama Court of Appeals affirmed the decision of the Court of first instance and over-ruled an application for re-hearing. Appellant then petitioned the Alabama Supreme Court for a writ of certiorari directed to the Alabama Court of Appeals. The Alabama Supreme Court denied the writ of certiorari and dismissed the petition.

Most important in the context of this proceeding is the undebatable proposition that by demurring to the complaint appellee has admitted the truth of all well pleaded facts. *Long v. Long*, 255 Ala. 353, 51 So. 2d 533; *Watkins v. Reinhart*, 243 Ala. 243, 9 So. 2d 113; *Montgomery v. Smith*, 226 Ala. 91, 145 So. 822; *Hanover Fire Insurance Co. v. Street*, 228 Ala. 677, 154 So. 816.

The complaint states that during all of 1953 appellant was "a non-resident of the State of Alabama, being a corporation organized and existing under the laws of the State of Georgia and was, during said time, engaged in the wholesale grocery business, and from time to time, during

said period, sold [and] delivered in interstate commerce certain of its groceries to retail merchants, located and doing business in said City of Opelika, that plaintiff had no office, storeroom or place of business whatsoever within the State of Alabama, that plaintiff had no inventory or store of goods within the State of Alabama for the purpose of making deliveries in the State of Alabama or for any other purpose, but that such sales were purely interstate sales made upon orders given to plaintiff's salesman and representative upon his solicitation of such orders from said retail merchants, which orders were transmitted or delivered by said salesman or representative to plaintiff, at its place of business in the City of West Point, in the State of Georgia, where the orders were accepted, whereupon the groceries so ordered were loaded upon plaintiff's trucks at its place of business in said City of West Point in the State of Georgia, and unloaded at said retail merchants' places of business at the end of a continuous movement in interstate commerce from plaintiff's said place of business in the State of Georgia to the purchasers' place of business in the City of Opelika."

Thus, appellant, a corporation of a State other than Alabama, has absolutely no contact with Opelika, Alabama other than the solicitation of orders in Opelika through salesmen or representatives, and the transportation of groceries from outside Alabama to Opelika, Alabama. The decision below in this case subjects appellant, by reason of such interstate activities, to a flat sum license tax. This alone is repugnant to the Commerce Clause of the Federal Constitution as it is a direct tax on interstate commerce.

It is significant also that merchants who dispose of groceries at wholesale in Opelika, which groceries are transported from a point within Opelika, are not subject to

the flat sum $250.00 license tax imposed on appellant. Their tax is graduated according to gross receipts derived from such local business. This is discrimination in its boldest form.

In addition, persons disposing of products other than wholesale groceries, whose activities are otherwise identically the same as appellant's, are taxed at only $100.00. This classification is unreasonable, unjustified, and contrary to the United States Constitution.

RAISING THE FEDERAL QUESTION BELOW.

The Constitutional points which appellant raises on this appeal were initially raised by the pleadings. Appellant attacked the validity of the Ordinance in question in its complaint as being repugnant to the Commerce Clause, the Due Process Clause, and the Equal Protection Clause of the United States Constitution. The court of first instance sustained a demurrer to the complaint.

The fact that the Federal questions were adequately and properly raised was recognized by the State Court of Appeals in its opinion.

> "The legality of the tax provided for under Section 130 (a) of the Ordinance is challenged on the ground (1) that it imposes an undue burden on inter-state commerce in violation of Article 1, Section 8, Clause 3, of the Federal Constitution, and (2) that it is arbitrary, unreasonable and discriminatory in that it differentiates between interstate commerce and intrastate commerce. * * *"

This Court will accept the recognition by the State Court that the Federal questions were properly raised in that court. *Charlestown Federal Savings & Loan Ass'n v. Alderson*, 324 U. S. 182 (1945).

THE FEDERAL QUESTIONS ARE SUBSTANTIAL.

Appellant has attacked the validity of the Ordinance involved herein on the grounds that it is repugnant to the Commerce Clause, the Due Process Clause, and the Equal Protection Clause of the United States Constitution.

This Court has repeatedly held that all flat sum license taxes necessarily discriminate against interstate commerce and are therefore invalid. This Court has itself recognized that such taxes have a substantial effect on interstate commerce. In *Nippert v. City of Richmond*, 327 U. S. 416 (1946), a case involving a flat sum license tax, this Court said:

> "* * * the Richmond tax imposes substantial excluding and discriminatory effects of its own. As has been said, the small operator particularly and more especially the casual or occasional one from out of the state will find the tax not only burdensome but prohibitive, with the result that the commerce is stopped before it is begun."

In *Memphis Steam Laundry Cleaner, Inc. v. Stone*, 342 U. S. 389 (1952) this Court struck down a flat sum license tax on the privilege of soliciting business in interstate commerce, declaring that a State could not carve out from the integral processes of interstate commerce the incident of solicitation. The rationale of the *Memphis* case is applicable to the instant case. The City of Opelika has sought to carve out of the integral economic process of interstate commerce the incident of disposing of groceries at wholesale within the City of Opelika. It thereby has placed a substantial barrier against the flow of interstate commerce.

When the flat sum license tax is a municipal tax, as it is here, its exclusionary effects upon interstate commerce are multiplied. Potentially the burden of such a tax could

be multiplied by the number of municipalities within the State and could effectively stop all interstate commerce. In the *Nippert* case this Court stated:

> "The potential excluding effects * * * are magnified many times by recalling that the tax is a municipal tax not one imposed by the State legislature for uniform application throughout the State. * * *"

The license tax here in question flagrantly discriminates against interstate commerce for the further reason that a local wholesole grocer delivering from a warehouse in Opelika is not subjected to the same flat sum $250.00 tax imposed on appellant. The local merchants' tax is graduated according to gross receipts derived from local business (App. "B," Section 82). Thus, a local wholesale grocer with gross receipts up to $100,000 from deliveries in Opelika is required to pay a tax of only $35.00. In contrast, appellant, to deliver even $1.00 worth of groceries in Opelika must pay a $250.00 tax.

Such an advance toll, exacted when the grocer cannot determine whether he can obtain enough Opelika business to justify entering into the market, effectively stops interstate commerce and deprives the grocer of his right to do business in Opelika. "Interstate commerce can hardly survive in so hostile an atmosphere." *Best & Co., Inc. v. Maxwell*, 311 U. S. 454 (1940).

The license taxes of the City of Opelika not only place a direct burden on interstate commerce and discriminate against foreign wholesale grocers, they also place foreign merchants who are wholesale grocers in one classification taxed at $250.00 per year, and foreign merchants who are not wholesale grocers in another classification taxed at $100.00 per year (App. "B," Section 130). There is no basis for this classification. It is unreasonable and therefore invalid.

The exclusionary effects of the Opelika tax are so great as to impair appellant's right to engage in the wholesale grocery business in interstate commerce. This is a substantial right which the City of Opelika may not contravene.

The decision below sustaining the validity of Section 130(a) should not be permitted to stand in open defiance of the existing pronouncements of this Court. This tax affects not only appellant but all other wholesale grocers who dispose of goods within Opelika from a point without Opelika. If the decision below stands unchallenged an open invitation is extended to every other municipality in Alabama and for that matter every municipality in the United States to impose a similar tax. To permit such a practice would completely throttle interstate commerce in favor of local interests and create an area within which a local businessman could exert complete monopolistic control to the exclusion of out of State dealers.

THIS CASE IS WITHIN THE JURISDICTIONAL PROVISIONS RELIED ON AND THE CASES CITED TO SUSTAIN JURISDICTION.

This appeal is taken pursuant to 28 U. S. C. A. § 1257 (2). That section confers appellate jurisdiction on this Court to review final judgments rendered by the highest court of a State in which a decision could be had when there is drawn in question the validity of a statute of the State on the grounds of its being repugnant to the Constitution, and the decision of the State court is in favor of validity.

There can be no question that a final judgment is involved in this appeal, as the court of first instance by sustaining the demurrers held that no cause of action is stated and thus appellant had no standing in court. This

is most certainly a final determination of appellant's rights.

This Court has many times held that a "statute" within the ambit of 28 U. S. C. A. § 1257 (2) means more than a State law enacted by the general legislative authority, and that it encompasses municipal ordinances, municipalities merely being political sub-divisions of the State. *King Manufacturing Co. vs. City Council of Augusta,* 277 U. S. 100 (1928); *Jamison v. Texas,* 318 U. S. 413 (1943); *Independent Warehouses, Inc. v. Scheele,* 331 U. S. 70 (1947); *Poulos v. New Hampshire,* 345 U. S. 395 (1953).

As previously noted the Supreme Court of Alabama denied the writ of certiorari to the Alabama Court of Appeals and dismissed the petition. The general rule is that where the order of the higher court amounts to an affirmance of the intermediate court decision, the appeal is to be taken from the higher court ruling. *Norfolk & Suburban Turnpike Co. v. Commonwealth of Virginia,* 225 U. S. 264 (1912). In the instant case, however, the ruling of the Alabama Supreme Court which denied the writ and dismissed the petition did not amount to an affirmance on the merits. It was a refusal to hear and determine the merits.

In *Michigan-Wisconsin Pipe Line Co. v. Calvert,* 347 U. S. 157 (1954) the highest State court noted "refused." The appellant took two appeals, one from the highest court, the other from the intermediate court. The Supreme Court dismissed the appeal from the highest court and heard the case on the appeal from the intermediate court. Similar cases are: *Sullivan v. Texas,* 207 U. S. 416 (1908); and *American Railway Express Co. v. Levee,* 263 U. S. 19 (1923).

It is clear, therefore, that the Alabama Supreme Court refused to hear the case on the merits. Accordingly, pursuant to existing Supreme Court authority the appeal is from the judgment of the Alabama Court of Appeals.

CONCLUSION.

Appellant respectfully suggests that this appeal brings before the Court Federal questions under the Constitution which are far reaching and important in terms of legal principles and practical impact on the taxation of interstate activities and the questions presented are so substantial as to require plenary consideration with briefs on the merits and oral arguments for the resolution.

Respectfully submitted,

M. R. SCHLESINGER,
Attorney for Appellant.

Of Counsel:

N. D. DENSON,
Opelika, Alabama,

TOM B. SLADE,
Columbus, Georgia.

APPENDIX "A."

Opinion of the Alabama Court of Appeals.

THE STATE OF ALABAMA—JUDICIAL DEPARTMENT
THE ALABAMA COURT OF APPEALS
OCTOBER TERM, 1955-56.

5 Div. 448

WEST POINT WHOLESALE GROCERY COMPANY

v.

CITY OF OPELIKA

APPEAL FROM LEE CIRCUIT COURT

PRICE, JUDGE

This suit was brought by appellant, West Point Wholesale Grocery Company, a corporation, seeking to recover monies paid as license fees under an ordinance of the City of Opelika.

Defendant's demurrers to the complaint were sustained and plaintiff took a non-suit and perfected this appeal. Title 7, Section 819, Code 1940.

The complaint alleges:

"1. The Plaintiff claims of the Defendant, City of Opelika, a municipal corporation organized and existing under the laws of the State of Alabama, the sum of Two Hundred Fifty and 50/100 ($250.00) Dollars, for that during the period, towit: January 1st, 1953, to and including the date of the filing of this Complaint, Plaintiff was, and is now, a non-resident of the State of Alabama, being a corporation organized and existing under the laws of the State of Georgia and was, during said time, engaged in the wholesale grocery business, and from time to time,

during said period, sold and delivered in interstate commerce certain of its groceries to retail merchants, located and doing business in said City of Opelika, that Plaintiff had no office, storeroom or place of business whatsoever within the State of Alabama, that Plaintiff had no inventory or store of goods within the State of Alabama [for the purpose of making deliveries in the State of Alabama][1] or for any other purpose, but that such sales were purely interstate sales made upon orders given to Plaintiff's salesman and representative upon his solicitation of such orders from said retail merchants, which orders were transmitted or delivered by said salesman or representative to Plaintiff, at its place of business in the City of West Point, in the State of Georgia, where the orders were accepted, whereupon the groceries so ordered were loaded upon Plaintiff's trucks at its place of business in said City of West Point in the State of Georgia, and unloaded at said retail merchants' place of business at the end of a continuous movement in interstate commerce from Plaintiff's said place of business in the State of Georgia to the purchasers' place of business in the City of Opelika.

Plaintiff further alleges that during said period, to-wit: from January 1st, 1953, to and including the day on which this Complaint is filed, the Defendant, said City of Opelika, had in full force and effect an ordinance, enacted by its Board of Commissioners, which fixed and prescribed a 'License Schedule' for said City of Opelika, Alabama, being 'An ordinance to fix and prescribe the rates for license or privilege taxes for trades, vocations, professions, and other businesses conducted within the City of Opelika,

---

[1] The language in brackets does not appear in the opinion. Appellant has taken the liberty of inserting it, in conformity with the complaint, as appellant believes it was inadvertently overlooked and is a typographical error.

Alabama,' which ordinance imposed a tax upon wholesale merchants as will appear from said 'schedule' which in words and figures, pertinent here, is as follows, to-wit:

"'82. MERCHANTS, WHOLESALE:

Where a gross annual business is:

$100,000.00 and less	35.00
Over $100,000.00 and less than $200,000.00	50.00
$200,000.00 and less than $500,000.00	75.00
$500,000.00 and less than $1,000,000.00	100.00
$1,000,000.00 and less than $2,000,000.00	200.00
$2,000,000.00 and over	250.00

And in addition thereto, one-sixteenth (1/16) of one percent (1%) on the first $500,000.00 gross receipts plus one-twentieth (1/20) of one percent (1%) on the next $500,000.00 gross receipts plus one-fortieth (1/40) of one percent (1%) on all gross receipts over one million dollars ($1,000,000.00)'

"And Plaintiff further alleges that during said period said Defendant City had in full force and effect an ordinance, enacted by its Board of Commissioners, which fixed and prescribed a 'License Schedule,' being 'An ordinance to fix and prescribe the rates for license or privilege taxes for trades, vocations, professions, and other businesses conducted within the City of Opelika, Alabama,' which ordinance imposed a tax upon 'Transient or Itinerant' merchants, as will appear from said 'Schedule' which in words and figures, pertinent here, is as follows, to-wit:

"'130. TRANSIENT OR ITINERANT:

Each person, firm, corporation or motor transportation company who unloads, delivers, distributes or disposes of any goods, wares, merchandise, or produce in the City of Opelika, Alabama, which said goods, wares, merchandise or produce was transported from a point without the City of Opelika, Alabama, to a point within the City of Opelika, Alabama, Annual Only ..... $100.00'

"Plaintiff further alleges that by an ordinance which was enacted by said Board of Commissioners and which became effective on, to-wit: January 21st, 1953, said license schedule was amended, said amendment as advertised and published in Opelika Daily News, a newspaper published in said City, in its issue of January 21st, 1953, being as follows, to-wit:

"ORDINANCE No. 103-53

"An Ordinance to Amend Ordinance No. 101-53 entitled City License Schedule for 1953.

"Be it ordained by the Board of Commissioners of the City of Opelika, Alabama, as follows:

"1. That Ordinance No. 101-53 of the City of Opelika, Alabama, entitled City License Schedule for 1953, be amended by adding thereto sub-section 130(a), as hereinafter set forth, and by amending sub-section 130 thereof to read as follows:

"130. TRANSIENT OR ITINERANT:

"Each person, firm, corporation or motor transportation company, except persons, firms or corporations engaged in the wholesale grocery business delivering, distributing or disposing of groceries at wholesale, who unloads, delivers, distributes, or disposes, of any goods, wares, merchandise, or produce in the City of Opelika, Alabama, which said goods, wares, merchandise or produce was transported from a point without the City of Opelika, Alabama, to a point within the City of Opelika, Alabama, Annual Only ---------- $100.00.

"130(a) TRANSIENT OR ITINERANT-WHOLESALE GROCERS:

"Each person, firm, or corporation engaged in the wholesale grocery business who unloads, delivers, distributes or disposes of groceries at wholesale in the City of Opelika, Alabama, which are transported from

a point without the City of Opelika, Alabama, to a point within the City of Opelika, Alabama, Annual Only ..... $250.00.

"2. This ordinance shall become effective immediately after the publication.

"Adopted and Approved this the 20th day of January 1953.

"(s) EALON M. LAMBERT
President of the Board of Commissioners of the City of Opelika, Alabama.

"Attest:
W. F. Pearson
City Clerk
(Adv. 21).

"Plaintiff further alleges that the above quoted provisions are some of many provisions in said ordinance, constituting the 'City License Schedule' adopted by said City of Opelika.

"Plaintiff further alleges that said City of Opelika, upon the passage of said amended ordinance, demanded that Plaintiff pay said license tax of $250.00 together with an issuance fee of 50¢; under penalty of being adjudged in violation of law and subject, as shown by that section of 'City License Schedule for 1953' then in force and effect, to fine and imprisonment, which section is in words and figures as follows:

" 'd. PENALTIES:

It shall be unlawful for any person, firm, or corporation, to engage in any of the businesses or vocations for which a license may be required without first having procured a license therefor, and any violation hereof shall constitute a criminal offense and shall be punishable by fine not to exceed one hundred

($100.00) dollars for each offense and by imprisonment not to exceed thirty days and not less than the amount of the licenses, either or both at the discretion of the Court trying the same, and each day when such business or vocation is conducted without such license shall constitute a separate offense.'

"Plaintiff further alleges that it paid said license tax of $250.00, and issuance fee of 50 cents, so demanded by said Defendant City.

"Plaintiff further alleges that the aforesaid deliveries and unloadings by it from its trucks were of groceries in interstate commerce at the end of continuous interstate movements from Plaintiff's place of business in the City of West Point in the State of Georgia to the places of business of the purchasing retail merchants in said City of Opelika, Alabama, and that said ordinance of said City of Opelika, Alabama, and the license tax levied and applied to this Plaintiff thereunder constitute an undue burden upon such interstate commerce.

"Plaintiff further alleges that the aforesaid ordinance of said City of Opelika, Alabama, and the license tax levied thereunder, are arbitrary, unreasonable and discriminatory, in that they differentiate between interstate commerce and intrastate commerce, setting up everyone 'who unloads, delivers, distributes or disposes of any goods, wares, merchandise or produce in the City of Opelika, Alabama, which said goods, wares, merchandise or produce was transported from a point without the City of Opelika, Alabama, to a point within the City of Opelika, Alabama,' as one classification taxed in one way, namely, a flat-sum, and those who unload, deliver, distribute, or dispose of any goods, wares, merchandise, or produce in the City of Opelika, Alabama, other than goods, wares, merchandise,

or produce transported from a point without the City of Opelika, Alabama, to a point within the City of Opelika, Alabama, as a separate classification taxed in a different way, namely, apportioned on the basis of gross receipts.

"Plaintiff further alleges that said ordinance of said City of Opelika, Alabama, and the license tax levied thereunder, are arbitrary, unreasonable and discriminatory, in that they differentiate among interstate merchants properly in the same class as Plaintiff, said ordinance setting up everyone 'engaged in the wholesale grocery business who unloads, delivers, distributes or disposes of groceries at wholesale in the City of Opelika, Alabama, which are transported from a point without the City of Opelika, Alabama, to a point within the City of Opelika, Alabama,' as one classification taxed at $250.00 per year, * * *[2] and setting up everyone 'except persons, firms, or corporations engaged in the wholesale grocery business delivering, distributing, or disposing of groceries at wholesale, who unloads, delivers, distributes, or disposes of any goods, wares, merchandise, or produce in the City of Opelika, Alabama, which said goods, wares, merchandise, or produce was transported from a point without the City of Opelika, Ala-

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[2] The following language, which appears in both the official and published opinion, has been omitted above because it is the belief of Appellant that such language was inadvertently included, the same not appearing as part of the complaint:

"and setting up everyone 'except, firms, or corporations engaged in the whole grocery business dellvering, distributing, or disposing of groceries at wholesale, who unloads, delivers, distributes, or disposes of any goods, wares, merchandise, or produce in the City of Opelika, Alabama, which said goods, wares, merchandise, or produce was transported from a point without the City of Opelika, Alabama, to a point within the City of Opelika, Alabama,' as one classification taxed at $250.00 per year,"

bama, to a point within the City of Opelika, Alabama,' as a separate classification taxed at $100.00 per year.

"Plaintiff further alleges that the said ordinance of said City of Opelika, Alabama, and the flat-sum license tax levied and applied to this Plaintiff thereunder, are arbitrary, unreasonable and discriminatory, in that they are not uniform in their burden upon those in the class set up by said ordinance of which Plaintiff is a member, said ordinance taxing everyone 'engaged in the wholesale grocery business who unloads, delivers, distributes or disposes of groceries at wholesale in the City of Opelika, Alabama, which are transported from a point without the City of Opelika, Alabama, to a point within the City of Opelika, Alabama,' at $250.00 per year without any apportionment upon any basis whatsoever.

"Plaintiff further alleges that said ordinance of said City of Opelika, Alabama, and the license tax levied thereunder, as applied to this Plaintiff are arbitrary, unreasonable and discriminatory, creating a burden upon interstate commerce, in that they discriminate between solicitation of business in interstate commerce and solicitation of business in intrastate commerce, said ordinance taxing 'each person, firm or corporation engaged in the wholesale grocery business who unloads, delivers, distributes or disposes of groceries at wholesale in the City of Opelika, Alabama, which are transported from a point without the City of Opelika, Alabama, to a point within the City of Opelika, Alabama,' at a flat sum of $250.00 per year, while a person, firm, or corporation engaged in the wholesale grocery business who unloads, delivers, distributes or disposes of groceries at wholesale in the City of Opelika, Alabama, other than groceries transported from a point without the City of Opelika, Alabama, to a point within the

City of Opelika, Alabama, is taxed on the basis of its gross receipts, and may pay a much smaller tax even though its gross sales are the same as those of the person, firm or corporation engaged in interstate commerce who must pay the flat-sum of $250.00.

"Plaintiff further alleges that because of such discrimination as set forth above, the said ordinance of said City of Opelika, Alabama, and the flat-sum license tax levied and applied to this Plaintiff thereunder, deprived Plaintiff of its property without due process of law.

"Plaintiff further alleges that for all of the facts and reasons hereinabove set forth said ordinance of said City of Opelika, Alabama, and the license tax levied thereunder, violate and are contrary and repugnant to the Constitution of the United States and the Constitution of Alabama, and in particular Article I, Section 8, Clause 3, and Article IV, Section 2 of the Constitution of the United States, the Fourteenth Amendment to the Constitution of the United States, and Sections 1 and 35 of the Constitution of Alabama, all of which results in said ordinance and tax being illegal and void.

"Plaintiff further alleges that on or about February 15, 1953, it paid to said City of Opelika the sum of $250.00 and an issuance fee of 50 cents demanded and exacted of it under and by virtue of said ordinance, namely: License Schedule 130(a), and Plaintiff avers that said sums of $250.00 and 50 cents were paid by Plaintiff to said Defendant City of Opelika, under mistake of law or fact and that said City of Opelika, now retains the same, and Plaintiff therefore claims of said Defendant City of Opelika the sum of $250.50 for money on, to-wit: February 15th, 1953, had and received by said Defendant City of Opelika, which sum of money, to-wit: $250.50 with the interest thereon, is still unpaid."

The legality of the tax provided for under quoted Section 130(a) of the ordinance is challenged on the ground (1) that it imposes an undue burden on interstate commerce in violation of Article I, Section 8, Clause 3 of the Federal Constitution, and (2) that it is arbitrary, unreasonable and discriminatory in that it differentiates between interstate and intrastate commerce; differentiates between interstate merchants properly in the same class as appellant, because that said classification 130(a) fixes a license fee of $250.00 while classification 130 fixes a fee of $100.00; a flat sum license tax is levied without regard to the amount of business each year; discriminates between itinerant wholesale grocery merchants and local wholesale merchants in that the local merchants are taxed on a graduated gross receipts basis while itinerant wholesale grocers are required to pay a flat-sum license.

The ordinance is essentially identical with those previously considered and held valid in *Sanford v. City of Clanton,* 31 Ala. App. 253, 15 So. 2d 303; cert. den. 244 Ala. 671, 15 So. 2d 309; *Sanford Service Company v. City of Andalusia,* 36 Ala. App. 74, 55 So. 2d 854; cert. den. 256 Ala. 507, 55 So. 2d 856; *City of Enterprise v. Fleming,* 240 Ala. 460, 199 So. 691, 692.

The ordinance applies equally to deliveries of wholesale groceries in the City of Opelika, regardless of whether the transportation began within or without the State, therefore, defendant's contention that it differentiates between intrastate and interstate commerce is without merit. *Sanford v. City of Clanton, supra; Sanford Service Co. v. City of Andalusia, supra.*

The basis of classification is a reasonable one and applies equally to all within the class, *City of Enterprise v. Fleming, supra; Woco Pop Co. of Montgomery v. City*

of Montgomery, 219 Ala. 73, 121 So. 64; *American Bakeries Co. v. City of Huntsville,* 232 Ala. 612, 168 So. 880, and it is not discriminatory because a different tax was required of itinerant persons unloading, delivering, distributing or disposing of goods, wares, merchandise, or produce, other than wholesale groceries.

There is no merit in appellant's contention that the tax is discriminatory because it imposes upon the local wholesale merchant a graduated scale gross receipts tax for the privilege of engaging in local business, while appellant must pay a fixed-sum license tax. "It is well settled that a schedule of licenses may be prescribed for an itinerant person, firm or corporation different from that prescribed for one having an established place of business within the municipality." *American Bakeries v. City of Opelika,* 229 Ala., 388, 157 So. 206; *American Bakeries Co. v. City of Huntsville,* 232 Ala. 612, 168 So. 880.

Likewise, we find no merit in appellant's contention that all fixed-sum license taxes necessarily discriminate against interstate commerce. As was said by Judge Simpson in *Sanford v. City of Clanton, supra* "* * * the principle has been narrowly limited to fixed-sum license taxes imposed on the business of soliciting orders for purchase of goods to be shipped interstate."

We are of the opinion the complaint does not allege sufficient facts to support the conclusions of the pleader as to the charge of unlawful discrimination against appellant or to show that the requirement that appellant pay the license fees constitutes an illegal burden on interstate commerce. The demurrer was properly sustained.

The judgment of the circuit court is affirmed.

AFFIRMED.

APPENDIX "B."

Excerpts From City of Opelika License Schedule.

Ordinance No. 101-53 as amended by
Ordinance No. 103-53.

§ d. PENALTIES:

It shall be unlawful for any person, firm or corporation or agent of such person, firm or corporation, to engage in any of the businesses or vocations for which a license may be required without first having procured a license therefor, and any violation hereof shall constitute a criminal offense and shall be punishable by fine not to exceed one hundred ($100.00) dollars for each offense and by imprisonment not to exceed thirty days and not less than the amount of the licenses, either or both at the discretion of the Court trying the same, and each day when such business or vocation is conducted without such license shall constitute a separate offense.

§ 82. MERCHANT, WHOLESALE:

Where a gross annual business is:

$100,000.00 and less	$ 35.00
Over $100,000.00 and less than $200,000.00	$ 50.00
$200,000.00 and less than $500,000.00	$ 75.00
$500,000.00 and less than $1,000,000.00	$100.00
$1,000,000.00 and less than $2,000,000.00	$200.00
$2,000,000.00 and over	$250.00

And in addition thereto, one-sixteenth (1/16) of one percent (1%) on the first $500,000.00 gross receipts, plus one-twentieth (1/20) of one percent (1%) on the next $500,000. gross receipts plus one-fortieth (1/40) of one percent (1%) on all gross receipts over one million dollars ($1,000,000.00).

§ 130. TRANSIENT OR ITINERANT:

Each person, firm, corporation or motor transportation company, except persons, firms or corporations engaged in the wholesale grocery business delivering, distributing or disposing of groceries at wholesale, who unloads, delivers, distributes, or disposes of any goods, wares, merchandise, or produce in the City of Opelika, Alabama, which said goods, wares, merchandise or produce was transported from a point without the City of Opelika, Alabama to a point within the City of Opelika, Alabama, Annual Only $100.00

§ 130(a). TRANSIENT OR ITINER. WHOLESALE GROCERS:

Each person, firm or corporation engaged in the wholesale grocery business who unloads, delivers, distributes or disposes of groceries at wholesale in the City of Opelika, Alabama which are transported from a point without the City of Opelika, Alabama to a point within the City of Opelika, Alabama, Annual only $250.00

APPENDIX "C."

Order of the Alabama Court of Appeals.

THE STATE OF ALABAMA—JUDICIAL DEPARTMENT
THE ALABAMA COURT OF APPEALS
OCTOBER TERM, 1955-56.

5 Div. 448

WEST POINT WHOLESALE GROCERY COMPANY

v.

CITY OF OPELIKA

APPEAL FROM LEE CIRCUIT COURT

February 21, 1956

Come the parties by attorneys, and the record and matters therein assigned for errors, being submitted on briefs and duly examined and understood by the court, it is considered that in the record and proceedings of the Circuit Court there is no error. It is therefore considered that the judgment of the Circuit Court be in all things affirmed. It is also considered that the Appellant and N. D. Denson, surety on the appeal bond, pay the costs of appeal of this Court and of the Circuit Court.

In the Supreme Court of the United States

OCTOBER TERM, 1956
No. 478.

WEST POINT WHOLESALE GROCERY COMPANY,
Appellant,

VS.

THE CITY OF OPELIKA, ALABAMA,
Appellee.

APPEAL FROM THE COURT OF APPEALS OF ALABAMA.

BRIEF IN OPPOSITION TO MOTION TO DISMISS.

M. R. SCHLESINGER,
1700 N. B. C. Building,
Cleveland, Ohio,
Attorney for Appellant.

Of Counsel:
N. D. DENSON,
Opelika, Alabama,
TOM B. SLADE,
Columbus, Georgia.

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In the Supreme Court of the United States

OCTOBER TERM, 1956
No. 478.

WEST POINT WHOLESALE GROCERY COMPANY,
Appellant,
vs.
THE CITY OF OPELIKA, ALABAMA,
Appellee.

APPEAL FROM THE COURT OF APPEALS OF ALABAMA.

BRIEF IN OPPOSITION TO MOTION TO DISMISS.

The appellee, The City of Opelika, Alabama, has filed a motion to dismiss the appeal on the grounds:

(a) that the appeal does not present a substantial federal question, and

(b) that in part the federal questions were not timely or properly raised or passed on by the courts below.

STATEMENT OF THE CASE.

This is a suit brought against the appellee, The City of Opelika, Alabama, to recover monies paid to the City pursuant to a flat sum licence tax on the ground that the ordinance imposing the tax violates the Federal Constitution. Appellant, The West Point Wholesale Grocery Company, is a Georgia corporation whose activities are wholly interstate in character. (For a more complete statement of the case please see the Jurisdictional Statement, page 5.)

THE FEDERAL QUESTIONS PRESENTED ARE SUBSTANTIAL.

Appellee bases its attack on the ground that this Court has in the case of *McGoldrick v. Berwind-White Coal Mining Company*, 309 U. S. 33 (1940), conclusively decided that an annual flat sum licence tax levied upon persons engaged in interstate commerce does not violate the Federal Constitution.

The tax in the *Berwind-White* case was of equal application to all sales in New York City whether the goods had been transported in interstate commerce or not.

The licence tax in the instant case is applicable only to those who transport goods from a point without the City of Opelika, Alabama, to a point within the City of Opelika, Alabama. The tax on local wholesale grocers is graduated according to gross receipts derived from such local business.

In *Nippert v. City of Richmond*, 327 U. S. 416 (1946), a case involving a flat sum licence tax levied upon the solicitation of business in interstate commerce, this Court repudiated a similar attempt to apply the *Berwind-White* case when it said (at p. 423):

> "Appellee's rationalization [delivery separate and distinct from interstate commerce] takes only partial account of the reasoning and policy underlying the *Berwind-White* decision and its differentiation of the drummer authorities. If the only thing necessary to sustain a state tax bearing upon interstate commerce were to discover some local incident which might be regarded as separate and distinct from 'the transportation or intercourse which is' the commerce itself and then to lay the tax on that incident, all interstate commerce could be subjected to state taxation, and without regard to the substantial economic effects of the tax upon the commerce. For the situation is difficult

> to think of in which some incident of an interstate transaction taking place within a state could not be segregated by an act of mental gymnastics and made the fulcrum of the tax. All interstate commerce takes place within the confines of the states and necessarily involves 'incidents' occurring within each state through which it passes or with which it is connected in fact. And there is no known limit to the human mind's capacity to carve out from what is an entire or integral economic process particular phases or incidents, label them as 'separate and distinct' or 'local,' and thus achieve its desired result." (Bracketed matter supplied.)

It is quite obvious that the *Berwind-White* case involving a *non-discriminatory* tax on *all sales* does not support the validity of a flat sum licence tax upon interstate commerce. That case has no application whatsoever to this case, involving a *discriminatory flat sum* licence tax on *non-local* wholesale grocers.

THE FEDERAL QUESTIONS WERE TIMELY AND PROPERLY RAISED AND EXPRESSLY PASSED UPON BY THE COURT BELOW.

In essence this aspect of appellee's argument is based upon the contention that the case below was decided upon questions of local practice and pleading.

In the face of the opinion delivered by the court from which this appeal is taken, such a contention is without merit. The Alabama Court of Appeals stated (Jurisdictional Statement 22):

> "The legality of the tax provided for under quoted Section 130(a) of the ordinance is challenged on the ground (1) that it imposes an undue burden on interstate commerce in violation of Article 1, Section 8, Clause 3 of the Federal Constitution, and (2) that it is arbitrary, unreasonable and discriminatory in

that it differentiates between interstate and intrastate commerce; differentiates between interstate merchants properly in the same class as appellant, because that said classification 130(a) fixes a license fee of $250.00 while classification 130 fixes a fee of $100.00; a flat sum license tax is levied without regard to the amount of business each year; discriminates between itinerant wholesale grocery merchants and local wholesale merchants in that the local merchants are taxed on a graduated gross receipts basis while itinerant wholesale grocers are required to pay a flat-sum license."

In the next six paragraphs of its opinion the state appellate court disposed of, on federal grounds, to its own satisfaction, the Federal Constitutional questions raised by the demurrer. In these six paragraphs the court found that:

1. The ordinance is essentially identical with those previously considered and held valid.

2. The ordinance applies to the delivery of wholesale groceries within Opelika regardless of whether transportation began from within or without the state. (But the state court failed to note that the ordinance did not apply to local, Opelika merchants.)

3. The basis of classification is reasonable.

4. The tax is not discriminatory because local wholesalers are taxed on a graduated scale gross receipts tax.

5. Flat sum license taxes do not necessarily discriminate against interstate commerce.

6. The complaint does not support the charge of unlawful discrimination or show that the tax is an undue burden on interstate commerce.

Thus, the state court expressly recognized the federal questions and expressly sustained the demurrant on federal grounds. Appellee's contention that the federal questions were not properly or timely raised fly in the face of the state court's explicit statements.

In *Charlestown Federal Savings & Loan Ass'n v. Alderson*, 324 U. S. 182 (1945), this Court made it clear that where a state court of last resort decides a federal question the United States Supreme Court has jurisdiction to review, when it said (at 185-6):

> "Where it appears from the opinion of the state court of last resort that a state statute was drawn in question, as repugnant to the Constitution, and that the decision of the court was in favor of validity, we have jurisdiction on appeal. For we need not inquire how and when the question of validity of the statute was raised when such question appears to have been actually considered and decided by that court."

The rule stated in the *Charlestown* case is applicable even where the federal question; though not raised or passed upon in the trial court, was passed upon in the state appellate court. *Home Ins. Co. v. Dick*, 281 U. S. 397, 407 (1930); *Saltonstall v. Saltonstall*, 276 U. S. 260, 267 (1928); *Chicago, Rock Island & Pacific Ry. v. Perry*, 259 U. S. 548, 551 (1922).

While it is clear that under any possible view the court below passed upon the federal questions, the determination of whether a federal question is properly before this Court is for this and no other court to decide. As was said in *First National Bank of Guthrie Center v. Anderson*, 269 U. S. 341, 346 (1926):

> "Whether a pleading sets up a sufficient right of action or defense, grounded on the Constitution or a

law of the United States, is necessarily a question of federal law; and where a case coming from a state court presents that question, this Court must determine for itself the sufficiency of the allegations displaying the right or defense, and is not concluded by the view taken of them by the state court."

In the more recent case of *Brown v. Western Railway of Alabama*, 338 U. S. 294, 296 (1949), this Court reaffirmed that doctrine. A different rule would permit the evasion of a decision on federal grounds in the name of local practice. This is not permitted. *Davis v. Wechleser*, 263 U. S. 22, 24 (1923); *Covington & Lexington Turnpike Road Co. v. Samford*, 164 U. S. 578, 595-6 (1896); *Carter v. Texas*, 177 U. S. 442, 447 (1900), *Boyd v. Thayer*, 143 U. S. 135, 180 (1892); *Mitchell v. Clark*, 110 U. S. 633, 645 (1884).

CONCLUSION.

Appellant respectfully suggests that the federal questions are substantial, that the federal questions were properly and timely raised in the Court of Appeals.

Appellant respectfully requests that the Motion to Dismiss be overruled in all respects.

Respectfully submitted,

M. R. SCHLESINGER,

Attorney for Appellant.

Of Counsel:

N. D. DENSON,

Opelika, Alabama,

TOM B. SLADE,

Columbus, Georgia.

In the Supreme Court of the United States

OCTOBER TERM, 1956.

No. 478.

WEST POINT WHOLESALE GROCERY COMPANY,
Appellant,

vs.

THE CITY OF OPELIKA, ALABAMA,
Appellee.

APPEAL FROM THE COURT OF APPEALS OF ALABAMA.

BRIEF ON THE MERITS.

M. R. SCHLESINGER,
1700 N. B. C. Building,
Cleveland, Ohio,
Attorney for Appellant.

Of Counsel:

N. D. DENSON,
Opelika, Alabama,

TOM B. SLADE,
Columbus, Georgia.

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In the Supreme Court of the United States

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Appellant,

vs.

THE CITY OF OPELIKA, ALABAMA,

Appellee.

APPEAL FROM THE COURT OF APPEALS OF ALABAMA.

BRIEF ON THE MERITS.

CASE REPORTED BELOW.

The Court of Appeals of Alabama is the only lower court which has written an opinion in this case. *West Point Wholesale Grocery Company v. The City of Opelika*, 87 So. 2d 661 (Ala. 1956).

STATEMENT OF JURISDICTIONAL GROUNDS.

The jurisdiction of this Court is invoked pursuant to 28 U. S. C. A. § 1257(2) (1946). The appellant herein filed a complaint against the City of Opelika, Alabama, attacking the validity of a city ordinance on the grounds that, as applied to appellant, the ordinance was repugnant to both the Federal and Alabama Constitutions. The Trial Court sustained a demurrer to the complaint and a non-suit was entered. The Alabama Court of Appeals affirmed.

This appeal is from the decision of the Alabama Court of Appeals which was rendered on February 21, 1956. A rehearing was denied by the Alabama Court of Appeals on April 3, 1956, and within the time permitted by Alabama law appellant petitioned for a writ of certiorari to the Supreme Court of Alabama. The Supreme Court of Alabama denied the writ of certiorari and dismissed the petition on May 24, 1956. A notice of appeal to this Court was filed by appellant with the Clerk of the Court of Appeals of Alabama on August 9, 1956.

Probable jurisdiction was noted by this Court on December 3, 1956, and the case was transferred to the summary docket.

CONSTITUTIONAL PROVISIONS AND ORDINANCES INVOLVED.

1. Ordinances of the City of Opelika, Alabama.

Section 130(a) of The City of Opelika, Alabama, Ordinance No. 101-53 as amended by Ordinance No. 103-53 is the ordinance which, as applied to appellant for the year 1953, is attacked as being repugnant to the Commerce Clause of the United States Constitution. Ordinance No. 101-53 as amended by Ordinance No. 103-53 reads in part as follows:

> "Be It Ordained by the Board of Commissioners of the City of Opelika, Alabama, that the following schedule of rates for license or privilege taxes for the conduct of any trade, vocation, profession or other business conducted within the City of Opelika, and its police jurisdiction for the year beginning January 1, 1953, and ending December 31, 1953 and the following conditions and provisions for the conduct thereof, and the following penalties for the violation thereof, be and it is hereby adopted."

* * * * *

"Section 130(a) TRANSIENT OR ITINERANT WHOLESALE GROCERS:

Each person, firm or corporation engaged in the wholesale grocery business who unloads, delivers, distributes or disposes of groceries at wholesale in the City of Opelika, Alabama which are transported from a point without the City of Opelika, Alabama, to a point within the City of Opelika, Alabama, Annual Only $250.00"

Attached hereto as Appendix "A" are sections d, 82, and 130(a) of Ordinance No. 101-53 as amended by Ordinance No. 103-53. Although sections d and 82 are not directly attacked in this appeal, reference must be made to them for a complete consideration of the issues. Section d provides penalties for non-compliance with the ordinance. Section 82 provides for the taxation of local Opelika wholesale merchants.

2. Provisions of the United States Constitution.

Article I, Section 8, of the United States Constitution provides in part as follows:

"The Congress shall have Power * * * (3) to regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes * * *."

The 14th Amendment to the United States Constitution provides in part as follows:

"Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

QUESTIONS PRESENTED.

The following questions are presented by this appeal:

1. Whether Section 130(a) of Ordinance No. 101-53 as amended by Ordinance No. 103-53 of the City of Opelika, Alabama, levying a $250.00 annual flat sum license tax for 1953 upon each person, firm or corporation which unloaded or delivered groceries at wholesale in the City of Opelika, Alabama, which groceries were transported in uninterrupted interstate commerce from a point without Opelika, violated the Commerce Clause of the United States Constitution (U. S. Const. Art. I, § 8, cl. 3), and the Equal Protection and Due Process Clauses of the United States Constitution (U. S. Const. Amend. XIV, § 1) as applied to appellant for the reason that any flat sum license tax as so applied is invalid.

2. Whether the above Section 130(a) as so applied violated the said Commerce, Equal Protection and Due Process Clauses, particularly since another provision of the same Ordinance (being section 82 thereof) levied an annual license tax upon each wholesale merchant which unloaded or delivered groceries at wholesale in the City of Opelika, Alabama, which groceries were transported from a point within Opelika, at a graduated amount apportioned according to the gross receipts derived from such merchant's business.

STATEMENT OF THE CASE.

This is a suit brought against the City of Opelika, Alabama, to recover monies paid to the City pursuant to the provisions of Section 130(a) of Ordinance No. 101-53 as amended by Ordinance No. 103-53 on the ground that Section 130(a) is in conflict with the United States Constitution. Appellant was required to pay the flat sum license tax levied by this section under penalty of being adjudged in violation of the law and subject to a fine and imprisonment as is provided in Section d of Ordinance 101-53 (App. "A").

Without filing an answer or other responsive pleading the appellee demurred to the complaint, which demurrer was sustained, and successive appeals have brought this case to the United States Supreme Court.

By demurring to the complaint appellee has admitted the truth of all well pleaded facts. *Long v. Long*, 255 Ala. 353, 51 So. 2d 533 (1951); *Watkins v. Reinhart*, 243 Ala. 243, 9 So. 2d 113 (1942); *Montgomery v. Smith*, 226 Ala. 91, 145 So. 822 (1933); *Hanover Fire Insurance Co. v. Street*, 228 Ala. 677, 154 So. 816 (1934). Accordingly, all of the facts relevant to this appeal are stated in appellant's complaint filed in the Trial Court (R. 1).

The complaint states, among other things, that during all of 1953 appellant was "a non-resident of the State of Alabama, being a corporation organized and existing under the laws of the State of Georgia and was, during said time, engaged in the wholesale grocery business, and from time to time, during said period, sold and delivered in interstate commerce certain of its groceries to retail merchants, located and doing business in said City of Opelika, that plaintiff had no office, storeroom or place of business whatsoever within the State of Alabama, that plaintiff had

no inventory or store of goods within the State of Alabama for the purpose of making deliveries in the State of Alabama or for any other purpose, but that such sales were purely interstate sales made upon orders given to plaintiff's salesman and representative upon his solicitation of such orders from said retail merchants, which orders were transmitted or delivered by said salesman or representative to plaintiff, at its place of business in the City of West Point, in the State of Georgia, where the orders were accepted, whereupon the groceries so ordered were loaded upon plaintiff's trucks at its place of business in said City of West Point in the State of Georgia, and unloaded at said retail merchants' places of business at the end of a continuous movement in interstate commerce from plaintiff's said place of business in the State of Georgia to the purchasers' place of business in the City of Opelika" (R. 1).

Thus, appellant, a corporation of a State other than Alabama, had absolutely no contact with Opelika, Alabama other than the solicitation of orders in Opelika through salesmen or representatives, and the transportation of groceries in continuous interstate journeys from outside Alabama to Opelika, Alabama. The decision below in this case subjects appellant, by reason of such interstate activities, to a flat sum license tax.

It is significant also that under Section 82 of the Ordinance merchants who dispose of groceries at wholesale in Opelika, which groceries were transported from a point **within** Opelika, are not subject to the flat sum of $250.00 license tax imposed on appellant. Their tax is graduated according to gross receipts derived from such merchants' business (App. "A").

SUMMARY OF ARGUMENT.

The Opelika taxing ordinance under review—Section 130(a) of Ordinance No. 101-53 as amended by Ordinance No. 103-53—is invalid as applied against the appellant for the year 1953 for both of the two following reasons:

1. It is a flat sum license tax imposed by a municipality on interstate commerce and therefore necessarily discriminates in operation against interstate commerce. This Court, in the long line of so-called 'drummer cases' headed by *Robbins v. Shelby County Taxing District*, 120 U. S. 489 (1887), and most recently reiterated in *Nippert v. City of Richmond*, 327 U. S. 416 (1946), and in *Memphis Steam Laundry Cleaners, Inc. v. Stone*, 342 U. S. 389 (1952), has consistently held such flat sum license taxes to be a discriminatory, and therefore unconstitutional, burden on interstate commerce.

2. Quite apart from the fact that any flat sum license tax as applied to interstate commerce is invalid, the Opelika Ordinance is invalid for a second reason: it is discriminatory on its face because local wholesale merchants are subject to a license tax graduated according to gross receipts and not to a flat sum license tax. Thus the Ordinance imposes on appellant, a Georgia corporation engaged solely in interstate commerce in Opelika, Alabama, a kind of tax and an amount of tax which is far more onerous than the tax imposed on appellant's local competitors. This Court has stated clearly and forcefully, in the *Memphis Steam Laundry Cleaners, Inc.*, case, *cit. supra*, and in *Best & Company v. Maxwell*, 311 U. S. 454 (1940), that such a discriminatory tax is an unconstitutional burden on interstate commerce.

ARGUMENT.

THE OPELIKA TAXING ORDINANCE UNDER REVIEW IS INVALID AS APPLIED TO APPELLANT BECAUSE IT IS A FLAT SUM LICENSE TAX IMPOSED UPON INTERSTATE COMMERCE AND IS THEREFORE DISCRIMINATORY IN ITS OPERATION; FURTHERMORE, IT IS DISCRIMINATORY ON ITS FACE SINCE LOCAL WHOLESALE GROCERS ARE TAXED IN A DIFFERENT MANNER AND AT A DIFFERENT RATE FROM NON-LOCAL WHOLESALE GROCERS.

I. The Opelika Taxing Ordinance Under Review is Invalid as Applied to Appellant Because it is a Flat Sum License Tax Imposed Upon Interstate Commerce and is Therefore Necessarily Discriminatory Against Interstate Commerce.

The Opelika Taxing Ordinance under review as applied to appellant is a fixed-sum license tax imposed by a municipality on interstate commerce. As such it is precisely the kind of unwarranted burden on interstate commerce which has been consistently condemned by this Court as being an unconstitutional discrimination against interstate commerce. *Nipperi v. City of Richmond*, 327 U. S. 416 (1946); *Memphis Steam Laundry Cleaners Inc. v. Stone*, 342 U. S. 389 (1952); *Robbins v. Shelby County Taxing District*, 120 U. S. 489 (1887).*

This Court has on numerous occasions pointed out the stultifying effect on interstate commerce which would obtain if States and municipalities were permitted to levy on interstate commerce the type of license tax here imposed. If Opelika could validly impose a flat sum license

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* The *Robbins* case began a long line of cases—the so-called 'drummer' cases—which have consistently invalidated such flat sum license taxes on interstate commerce. In the interest of relative brevity, the appellant has not burdened this brief with the citation of those authorities but has referred only to the most recent decisions.

tax on appellant for the privilege of delivering goods in interstate commerce, each State, and what is far worse, each municipality, in which appellant sought to deliver wholesale groceries could impose a like tax. The aggregate burden of such taxes would be prohibitive. While the merchants of a particular community might temporarily benefit by such exclusionary taxes, the economy of the nation would almost certainly stagnate. Because of such potentially dire effects to the nation's economy, this Court has consistently held that all flat sum license taxes are discriminatory in operation against interstate commerce and violative of the Commerce Clause of the United States Constitution.*

Indeed, the wisdom of this Court's consistent rulings invalidating such flat sum license taxes on interstate commerce cannot be seriously questioned at this late date. This Court has spoken decisively and repeatedly.

In *Nippert v. City of Richmond*, 327 U. S. 416 (1946), the appellant was convicted and fined for failing to procure

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* Any flat sum license tax attempted to be imposed by a State or municipality on interstate commerce is unconstitutional, even though the statute or ordinance purports to tax merchants who do a strictly local business at the same rate as merchants who are engaged in interstate commerce. *Nippert v. City of Richmond*, 327 U. S. 416 (1946). The reason, of course, is that the interstate merchant could be subject to hundreds, or indeed thousands, of such flat sum license taxes and, accordingly, the flat sum license tax is in actual operation discriminatory against the interstate merchant. Where the license tax imposed upon the interstate merchant is also discriminatory on its face against the interstate merchant (that is, where the tax imposed on the interstate merchant is higher than the tax imposed on similar merchants who do simply a local business), then the tax is unconstitutional on two separate grounds. The relevant Opelika ordinance as applied to appellant is invalid on both such grounds. It is a flat sum license tax and therefore discriminatory in its operation (subdivision I. of this Argument); it is also discriminatory on its face (subdivision II. of this Argument, beginning at page 14).

a license under a City of Richmond ordinance which levied upon all solicitors a $50.00 flat sum tax plus a percentage of gross earnings. On appeal to this Court, the conviction was reversed because of the unconstitutionality of the ordinance. The Court in this case made it clear that any flat-sum license tax levied on interstate commerce necessarily discriminates against interstate commerce, that such a tax imposes substantial excluding effects on interstate commerce and that the potential excluding effects of such a tax are greatly multiplied when it is recalled that the tax is levied by a municipality and not a state. This Court concluded its opinion by stating as follows (p. 434):

> "The tax here in question inherently involves too many probabilities, and we think actualities, for exclusion of or discrimination against interstate commerce, in favor of local competing business, to be sustained in any application substantially similar to the present one. Whether or not it was so intended, those are its necessary effects. Indeed, in view of that fact and others of common knowledge, we cannot be unmindful, as our predecessors were not when they struck down the drummer taxes, that these ordinances lend themselves peculiarly to creating those very consequences or that in fact this is often if not always the object of the local commercial influences which induce their adoption. Provincial interests and local political power are at their maximum weight in bringing about acceptance of this type of legislation. With the forces behind it, this is the very kind of barrier the commerce clause was put in the fundamental law to guard against."

The *Nippert* case is on all fours with the instant case, except in one respect in which this appellant is immeasurably stronger. In *Nippert*, the tax involved was a municipal tax; so also is the tax imposed by Opelika, Alabama.

in the instant case. In *Nippert*, the tax involved was a flat sum license tax required to be paid in advance by a person who was soliciting interstate sales; in the instant case, Opelika requires a flat sum license tax to be paid in advance by appellant who engages in interstate commerce. In *Nippert*, the appellant was required to pay a fixed sum whether she solicited $1.00 of sales or $1,000,000 of sales in the City of Richmond; so also in the instant case, the appellant was required to pay a fixed sum whether it delivered $1.00 or $1,000,000 of merchandise in Opelika. This Court held that the Richmond ordinance was unconstitutional as applied to interstate commerce; it necessarily follows that the Opelika ordinance under review is unconstitutional as applied to appellant.

Indeed, the facts involved in the *Nippert* case were in one respect weaker for the appellant than are the facts in the instant case. In *Nippert*, the flat sum license tax was equally applicable to all solicitors, whether engaged in purely a local business or whether engaged in interstate commerce. The Richmond ordinance there involved was therefore not discriminatory on its face, although it was of course discriminatory in its actual operation. On the contrary, however, in the instant case, the Opelika tax is not only discriminatory in its actual operation, but, as we shall discuss in more detail in subdivision **II.** of this Argument, it is also discriminatory on its face. The Richmond ordinance was only once-condemned; the Opelika ordinance is twice-condemned.

In the recent case of *Memphis Steam Laundry Cleaners, Inc. v. Stone*, 342 U. S. 389 (1952), this Court again invalidated a flat sum license tax imposed on interstate commerce. The State of Mississippi levied a $50.00 flat sum license tax on the solicitation of business for a laundry not

licensed in the State of Mississippi. The appellant in that case operated a laundry in Memphis, Tennessee, sending its trucks into eight Mississippi counties to pick up, deliver, and collect laundry, and to seek new customers. The Court invalidated the Mississippi statute on the ground that the solicitation of interstate business was such an integral part of interstate commerce that a tax upon it "stands on no better footing than a tax upon the privilege of doing interstate business." (p. 393.)

In view of the decision in the *Memphis Steam Laundry Cleaners, Inc.* case, there can be no doubt that the ordinance attacked in this appeal is in conflict with the Commerce Clause. The tax levied by Mississippi was a flat sum license tax required to be paid in advance by persons engaged in the solicitation of interstate business. In the instant case, Opelika requires appellant to pay a flat sum license tax for the privilege of delivering goods in interstate commerce. In the *Memphis Steam Laundry* case, the tax bore no relation to the amount of business solicited. The Opelika tax also bears no relation to the amount of business done by appellant in that City. In the *Memphis Steam Laundry* case, the tax was an advance toll required to be paid upon entrance into the market and before the taxpayer could evaluate the market's potentialities. The same holds true in the instant case. The Opelika tax was required to be paid upon the appellant's entrance into the Opelika market and before appellant could adequately appraise the market to determine whether the payment of the tax was commensurate with the amount of business it could expect to realize from its potential Opelika customers.

Indeed, the flat sum license tax which was declared unconstitutional in the *Memphis* case was a far less onerous

burden on interstate commerce than is the Opelika tax involved in the instant case. In the *Memphis* case, the tax involved was a **state** tax, whereas the tax involved in the instant case is a **municipal** tax. This Court held the state-imposed tax in *Memphis* to be unconstitutional because that tax, with its threat of multiple burdens, necessarily discriminated against interstate commerce. To a far greater extent does the municipally-imposed tax involved in the instant case discriminate against interstate commerce. This proposition was strongly emphasized in *Nippert v. City of Richmond*, 327 U. S. 416 (1946) when the Court stated (p. 429):

> "The potential excluding effects for itinerant salesmen become more apparent when the consequences of increasing the amount of the tax are considered, *Cf. McGoldrick v. Berwind-White Co., supra*, at 58, and they are magnified many times by recalling that the tax is a municipal tax not one imposed by the state legislature for uniform application throughout the state. * * *
>
> "But the cumulative effect, practically speaking, of flat municipal taxes laid in succession upon the itinerant merchant as he passes from town to town is obviously greater than that of any tax of statewide application likely to be laid by the legislature itself. And it is almost as obvious that the cumulative burden will be felt more strongly by the out-of-state itinerant than by the one who confines his movement within the State or the salesman who operates within a single community or only a few."

If Opelika could validly impose a flat sum license tax on appellant for the privilege of doing interstate business, so also could every other municipality in the nation. The effect on the nation's economy would be disastrous. It follows with even greater force than in the *Memphis*

case that the Opelika tax under review can not constitutionally be exacted of appellant.

Based upon both reason and the precedent established by the *Nippert* and *Memphis Steam Laundry Cleaners* cases, as well as many other decisions of this Court, it is clear that Section 130(a) of the Opelika privilege tax ordinance is an undue burden on interstate commerce and must be invalidated as being in conflict with the Commerce Clause.

II. The Opelika Ordinance is Unconstitutional for the Further Reason That it is Discriminatory on its Face Since Local Wholesale Grocers are Taxed in a Different Manner and at a Different Rate From Non-Local Wholesale Grocers.

The Opelika taxing ordinance under review is unconstitutional as applied to appellant because it is a flat sum license tax imposed by a municipality on interstate commerce. This Court, beginning with its decision in *Robbins v. Shelby County Taxing District* and extending down to the recent *Nippert* and *Memphis Steam Laundry* cases (which latter two cases are discussed in some detail in subdivision I. above), has consistently invalidated such taxes whether or not the taxing statute or ordinance discriminates on its face between merchants engaged in interstate commerce and merchants engaged solely in a local business.

In point of fact, however, the Opelika ordinance under review is unconstitutional as applied to appellant not only because it necessarily discriminates in its operation against interstate commerce (it being a flat sum license tax); it is unconstitutional on wholly separate grounds because it is discriminatory on its face. The appellant, a

Georgia corporation which is engaged in the wholesale grocery business and which does solely an interstate business in Opelika, Alabama, was required to pay in advance a flat sum license tax of $250.00 in order to carry on its interstate business in Opelika for the year 1953. A strictly local competitor of appellant would have paid for the same year a tax proportioned to the gross volume of sales effected by it in that year and would have paid that tax, not prior to conducting any local business (as did the appellant), but only after the close of the year. A strictly local competitor of appellant would have had to gross the astronomical amount of $280,000.00 in sales in 1953 in order to be required to pay the same tax which appellant had to pay before it could even set foot in Opelika. (Cf. section 82 with section 130(a) of Opelika Ordinance No. 101-53 as amended by Ordinance No. 103-53. Appendix A.) The discrimination against non-local wholesale grocers (in our case, against a Georgia corporation doing solely an interstate business in Opelika) is apparent on the very face of the relevant ordinances. This Court has consistently declared unconstitutional license taxes which on their face discriminate between resident and non-resident merchants.

In the *Memphis Steam Laundry* case this Court decided two alternative issues. This Court first assumed that the relevant tax was a flat sum license tax imposed on the solicitation of sales in interstate commerce; on that assumption, it invalidated the tax because it was a flat sum license tax on interstate commerce and therefore it necessarily discriminated against interstate commerce.*

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* This Court's decision on the first alternative issue presented in *Memphis Steam Laundry* is discussed in subdivision **I.** of this brief.

This Court then made the alternative assumption that the tax was imposed on the privilege of doing a strictly intrastate business. Even under that alternative assumption, this Court invalidated the tax as applied to the appellant because the tax to be paid by out-of-state laundries was greater than the tax to be paid by resident laundries. In that connection this Court stated (p. 393):

> "On the assumption that the tax is imposed upon appellant's Mississippi activities of picking up and delivering laundry and cleaning, the 'peddler' cases are invoked in support of the tax. Under that line of decisions, this Court has sustained state taxation upon itinerant hawkers and peddlers on the ground that the local sale and delivery of goods is an essentially intrastate process whether a retailer operates from a fixed location or from a wagon. However, assuming for the purposes of this case that Mississippi imposes its $50.00 per truck tax only upon the privilege of conducting intrastate activities, the tax must be held invalid as one discriminating against interstate commerce.
>
> "The $50.00 per truck tax is applicable only to vehicles used by a person 'soliciting business for a laundry **not licensed in this state as such.**' Laundries licensed in Mississippi pay a fixed fee to the municipality in which located, plus a tax of $8.00 per truck upon each truck used in other municipalities * * * The 'peddler' cases are inapposite under such a showing of discrimination since they support state taxation only where no discrimination against interstate commerce appears either upon the face of the tax laws or in their practical operation." (Emphasis supplied.)

The facts in the instant case are far stronger for the conclusion that the relevant ordinance is unconstitutional as applied to appellant than were the facts in *Memphis Steam Laundry*. In the *Memphis Steam Laundry* case,

this Court held that the discriminatory rate structure invalidated the relevant ordinance even on the assumption that it was being applied to a non-resident appellant **who was doing an intrastate business in Mississippi.** In the instant case, the appellant's activities in Opelika clearly constitute the conduct of interstate commerce. If a tax rate structure which discriminates against an out-of-state merchant who does an intrastate business is unconstitutional, it follows with even greater force that a tax rate structure is unconstitutional which discriminates against an out-of-state merchant who does solely an interstate business. Accordingly, it follows even more clearly than in the *Memphis Steam Laundry* case that the discriminatory rate structure of the Opelika ordinances invalidates the relevant ordinance as applied against the appellant.

In *Best & Company Inc. v. Maxwell*, 311 U. S. 454 (1940), North Carolina imposed an annual privilege tax of $250.00 on anyone not a regular retail merchant in the state who displayed samples in any hotel room or house rented or occupied temporarily for the purpose of securing retail orders. The only corresponding fixed-sum license tax exacted of regular retail merchants in North Carolina was one dollar a year for the privilege of doing business. This Court held that the statute was unconstitutional as applied to an out-of-state merchant because the rate structure discriminated against interstate commerce. This Court stated as follows (p. 455):

> "The commerce clause forbids discrimination, whether forthright or ingenious. In each case it is our duty to determine whether the statute under attack, whatever its name may be, will in its practical operation work discrimination against interstate commerce. This stand we think condemns the tax at bar. Nomi-

nally the statute taxes all who are not regular retail merchants in North Carolina, regardless of whether they are residents or non-residents. We must assume, however, on this record that those North Carolina residents competing with appellant for the sale of similar merchandise will normally be regular retail merchants. The retail stores of the state are the material outlets for merchandise, not those who sell only by sample. Some of these local shops may, like appellant, rent temporary display rooms in sections of North Carolina where they have no permanent store, but even these escape the tax at bar because the location of their central retail store somewhere within the state will qualify them as 'regular retail merchants in the State of North Carolina.' The only corresponding fixed-sum license tax to which appellant's real competitors are subject is a tax of $1 per annum for the privilege of doing business. Non-residents wishing to display their wares must either establish themselves as regular North Carolina retail merchants at prohibitive expense, or else pay this **$250 tax that bears no relation to actual or probable sales** but must be paid in advance no matter how small the sales turn out to be. Interstate commerce can hardly survive in so hostile an atmosphere. **A $250 investment in advance, required of out-of-state retailers but not of their real local competitors, can operate only to discourage and hinder the appearance of interstate commerce in the North Carolina retail market.** Extrastate merchants would be compelled to turn over their North Carolina trade to regular local merchants selling by sample. North Carolina regular retail merchants would benefit, but to the same extent the commerce of the Nation would suffer discrimination." (Emphasis supplied.)

In *Best & Company*, this Court declared unconstitutional a statute which, as applied to the appellant in that case, required a non-resident merchant to pay a flat sum

license tax of $250, while local competitors had to pay only one dollar per year for the privilege of doing business. In the instant case, appellant was required to pay in advance a flat sum license tax of $250 regardless of whether or not it would make substantial deliveries in Opelika; appellant's local competitors, by contrast, were required to pay a tax based only on gross receipts and the amount of that tax would in all probability be only a small fraction of the amount required to be paid in advance by appellant. The Opelika ordinance under review is clearly discriminatory on its face as applied against appellant.

CONCLUSION.

The decision below sustaining the validity of Section 130(a) should not be permitted to stand in open defiance of the existing pronouncements of this Court. This tax affects not only appellant but all other wholesale grocers who dispose of goods within Opelika from a point without Opelika. If the decision below stands unchallenged an open invitation is extended to every other municipality in Alabama and for that matter every municipality in the United States to impose a flat sum license tax on interstate commerce—a tax which would be doubly reprehensible if, as in the instant case, the municipality taxed local merchants in a different manner and at a different rate from that imposed on out-of-state merchants. To permit such a practice would completely throttle interstate commerce in favor of local interests and create an area within which a local businessman could exert complete monopolistic control to the exclusion of out-of-state dealers.

For all of the above reasons, appellant respectfully requests this Court to reverse the judgment of the Alabama Court of Appeals and to remand the case to the Lee

Circuit Court of Alabama with instructions that the demurrer to the appellant's complaint be overruled, and to direct the Lee Circuit Court of Alabama to proceed to dispose of the case on the merits in accordance with law and the dictates of the United States Constitution.

Respectfully submitted,

M. R. SCHLESINGER,

Attorney for Appellant.

Of Counsel:

N. D. DENSON,

Opelika, Alabama,

TOM B. SLADE,

Columbus, Georgia.

APPENDIX "A."

EXCERPTS FROM CITY OF OPELIKA LICENSE SCHEDULE.

Ordinance No. 101-53 as amended by Ordinance No. 103-53.

"Be It Ordained by the Board of Commissioners of the City of Opelika, Alabama, that the following schedule of rates for license or privilege taxes for the conduct of any trade, vocation, profession or other business conducted within the City of Opelika, and its police jurisdiction for the year beginning January 1, 1953, and ending December 31, 1953, and the following conditions and provisions for the conduct thereof, and the following penalties for the violation thereof be and it is hereby adopted."

* * * * *

§ d. PENALTIES:

It shall be unlawful for any person, firm or corporation or agent of such person, firm or corporation, to engage in any of the businesses or vocations for which a license may be required without first having procured a license therefor, and any violation hereof shall constitute a criminal offense and shall be punishable by fine not to exceed one hundred ($100.00) dollars for each offense and by imprisonment not to exceed thirty days and not less than the amount of the licenses, either or both at the discretion of the Court trying the same, and each day when such business or vocation is conducted without such license shall constitute a separate offense.

* * * * *

§ 82. MERCHANT, WHOLESALE:

Where a gross annual business is:

$100,000.00 and less	$35.00
Over $100,000.00 and less than $200,000.00	$50.00
$200,000.00 and less than $500,000.00	$75.00
$500,000.00 and less than $1,000,000.00	$100.00
$1,000,000.00 and less than $2,000,000.00	$200.00
$2,000,000.00 and over	$250.00

And in addition thereto, one-sixteenth (1/16) of one percent (1/16%) on the first $500,000.00 gross receipts, plus one-twentieth (1/20) of one percent (1/20%) on the next $500,000.00 gross receipts plus one-fortieth (1/40) of one percent (1/40%) on all gross receipts over one million dollars ($1,000,000.00).

* * * * *

§ 130(a). TRANSIENT OR ITINERANT WHOLESALE GROCERS:

Each person, firm or corporation engaged in the wholesale grocery business who unloads, delivers, distributes or disposes of groceries at wholesale in the City of Opelika, Alabama which are transported from a point without the City of Opelika, Alabama to a point within the City of Opelika, Alabama, Annual only $250.00.

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1956.

No. 478

WEST POINT WHOLESALE GROCERY COMPANY,

APPELLANT

VS.

THE CITY OF OPELIKA, ALABAMA

APPELLEE

APPEAL FROM THE COURT OF APPEALS OF ALABAMA

MOTION OF APPELLEE TO DISMISS

Lawrence K. Andrews,
American National Bank Building,
Union Springs, Alabama.

Attorney for Appellee.

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VS.

THE CITY OF OPELIKA, ALABAMA

APPELLEE.

APPEAL FROM THE COURT OF APPEALS
OF ALABAMA.

MOTION OF APPELLEE TO DISMISS

Appellee, The City of Opelika, Alabama, pursuant to Rule 16-1(B) of the Revised Rules of this Court, moves to dismiss the appeal in the above entitled case on the grounds:

(a) That the appeal does not present a substantial Federal question; and

(b) That, in part, the Federal questions sought to be raised were not timely or properly raised or expressly passed on by the Court below.

STATEMENT OF CASE.

FACTS

The Appellant, West Point Wholesale Grocery Company, filed its complaint against the Appellee, The City of Opelika, Alabama, in the Circuit Court of Lee County, Alabama, for the recovery of a license tax paid by it to the Appellee in the year 1953. The complaint alleges, in substance, that the Appellant was a resident of the State of Georgia, engaged in the wholesale grocery business, and that all business done in the State of Alabama and in the City of Opelika, was upon orders accepted in West Point, Georgia, and loaded on its trucks there and transported in trucks to Opelika and unloaded at retail merchants places of business at the end of a continuous movement in interstate commerce.

The complaint further alleges that in January, 1953, Appellee had in effect three license tax schedules. The first schedule imposed a license tax on wholesale merchants, based on a graduated schedule, the amount of the tax being determined by the gross receipts, the same being Section 82 of the City License Ordinance. The

second schedule imposed a flat license tax of $100.00 per annum on all transient or itinerant wholesalers other than those engaged in the wholesale grocery business, the same being Section 130 of said Ordinance. The third license schedule imposed a flat license tax of $250.00 per annum on transient or itinerant wholesale grocers, the same being 130 (a) of said Ordinance. The latter schedule reads as follows:

> "130 (a) Transient or Itinerant-Wholesale Grocers:
>
> "Each person, firm, or corporation engaged in the wholesale grocery business who unloads, delivers, distributes or disposes of groceries at wholesale in the City of Opelika, Alabama, which are transported from a point without the City of Opelika, Alabama, to a point within the City of Opelika, Alabama, Annual Only ..... $250.00."

The license tax in the sum of $250.00 was paid by the Appellant and this suit is brought for the recovery of the same. The license tax is alleged to be invalid on the grounds that:

(1) The same constitutes an undue burden on interstate commerce and, hence, violates the Commerce Clause of the Constitution;

(2) That the same discriminated between interstate commerce and intrastate commerce and violates the Commerce, Equal Protection and Due Process Clauses;

(3) That the license tax discriminates against wholesale grocers in that it differentiates between wholesale grocers and other wholesale merchants, and thus violates the Commerce, Equal Protection and Due Process Clauses.

The Appellee filed its demurrer to the complaint, the pertinent portions of the demurrer reading as follows:

"3. The allegations in the plaintiff's complaint that 'the deliveries and unloadings by it from its trucks were of groceries in interstate commerce at the end of continuous interstate movements from Plaintiff's place of business in the City of Columbus in the State of Georgia to the places of business of the purchasing retail merchants in said City of Opelika, Alabama, and that said ordinance of said City of Opelika, Alabama, and the license tax levied and applied to this Plaintiff thereunder constitute an undue burden upon such interstate commerce', is a mere conclusion of the pleader.

"4. It appears from the plaintiff's complaint that the plaintiff is seeking to recover the amount paid by it to defendant as a license, under certain provisions of defendant's license Schedule for 1953, on the ground that the provisions of the said License Schedule under which plaintiff paid the money to defendant, imposed an undue burden upon interstate commerce, whereas, it affirmatively appears from the allegations in the complaint that the acts done by plaintiff, and the business engaged in by the plaintiff, for which plaintiff paid the license fee sought to be recovered, constitute intrastate commerce and not interstate commerce.

"5. For aught that appears from the plaintiff's complaint, the amount of the license provided and imposed upon the plaintiff by the sections of the defendant's City License Schedule for 1953, men-

tioned in the complaint, was not in excess of the license fee for any other exhibition, trade, business or occupation of the same class.

"6. The plaintiff's complaint seeks to recover from defendant a certain sum of money alleged to have been paid by defendant as a license fee or tax for 1953 under defendant's City License Schedule for 1953, and alleges that the provisions of the License Schedule or ordinance, under which plaintiff so paid such money, are illegal and void in that same are arbitrary, unreasonable and discriminatory, whereas, for aught that appears from the allegations in the complaint the ordinance in question does not impose an undue burden upon interstate commerce, designates a reasonable basis for classification, and that the levy applies equally to all within the same class and imposes a like tax upon all who engage in the vocation or who may exercise the privilege taxed."

The demurrer was sustained by the Circuit Court. The judgment of the Circuit Court reading, in part, as follows:

"It is therefore considered, ordered and adjudged by the Court that the demurrer of the defendant filed to the complaint in this cause be and the same is hereby sustained."

The judgment of the Circuit Court of Lee County, Alabama, was affirmed by the Court of Appeals of Alabama, and certiorari was denied by the Supreme Court of Alabama. The decision of the Court of Appeals of Alabama is reported in 87 So. Rep. 2d. Series, page 661, et. seq.

THE FEDERAL QUESTIONS PRESENTED ARE NOT SUBSTANTIAL

Briefly stated, the questions presented by the Appellant are whether:

1. An annual flat sum license tax levied by the City of Opelika upon persons, firms or corporations delivering groceries at wholesale in the City of Opelika, from a point without the City, violated the Commerce Clause of the United States Constitution.

2. Whether the license tax of the City of Opelika levying a flat sum license on wholesale merchants who unload or deliver groceries at wholesale in the City of Opelika, Alabama, violates the Commerce, Equal Protection and Due Process Clauses, since the license tax levied against wholesalers in said City for groceries transported from a point within the City is based on a graduated amount according to the gross receipts of the local business.

3. Whether one classification for wholesale grocers and another classification for other wholesalers for license tax purposes is a discrimination in violation of the Equal Protection and Due Process Clauses of the Constitution.

The first question raised has been conclusively decided by this Court in the cases of *McGoldrick vs. Berwind-White Coal Mining Co.*, 309 U. S. 33, 60 S. Ct. 388, 84 L. Ed. 565; *Western Livestock v. Bureau of Revenue*, 303 U. S. 250, 58 S. Ct. 546, 82 L. Ed. 823. As will be discussed later, questions (2) and (3) were not properly raised and passed on by the Court below.

1. Ordinance No. 130(a) does not violate the Commerce Clause of the Constitution. The law is now well

settled that a State may levy a valid tax at the point of delivery on goods shipped in interstate commerce and such a tax does not violate the Commerce Clause of the Constitution of the United States.

The Appellant apparently relies upon the so-called "drummer cases" (*Robbins vs. Shelby County Taxing District*, 120 U. S. 489, 7 S. Ct. 592, 30 L. Ed. 694) but the tax here is levied on the sale and delivery of goods and not upon the solicitation. In the *McGoldrick case, supra*, the Court said:

> "The rule of *Robbins vs. Shelby County Taxing District, supra,* has been narrowly limited to fixed sum license taxes imposed on the business of soliciting orders for the purchase of goods to be shipped interstate."

THAT IN PART THE FEDERAL QUESTIONS SOUGHT TO BE RAISED WERE NOT TIMELY OR PROPERLY RAISED OR EXPRESSLY PASSED ON BY THE COURT BELOW.

2. Whether Ordinance No. 130(a) violates the Commerce, Equal Protection and Due Process Clauses of the Constitution has not been properly raised or expressly passed on by the Court below. The matter presented in the Court below was a question of pleading and the facts have never been presented to or passed on by the Courts of Alabama. It is not disputed that the demurrer admits the truth of all facts well pleaded. It is equally well settled that the demurrer does not admit either conclusions of law or conclusions of fact. *Southern Liquid Gas Co. vs. City of Dothan*, 44 So. 2d. 744, 253 Ala. 350; *Groover v. Darden*, 68 So. 2d. 28; *Sing-*

er Sewing Machine Co. v. Teasley, 73 So. 969, 198 Ala. 673.

The complaint contains the following allegation:

> "Plaintiff further alleges that the aforesaid deliveries and unloadings by it from its trucks were of groceries in interstate commerce at the end of continuous interstate movements from Plaintiff's place of business in the City of West Point in the State of Georgia to the places of business of the purchasing retail merchants in said City of Opelika, Alabama, and that said ordinance of said City of Opelika, Alabama, and the license tax levied and applied to this Plaintiff thereunder constitute an undue burden upon such interstate commerce."

Ground 3 of the demurrer aptly challenges the sufficiency of this allegation. The allegation is based in its entirety on the theory that the license constitutes an undue burden on interstate commerce and no question of discrimination is raised. Under the decision in the *McGoldrick case, supra*, the allegation is plainly an erroneous conclusion of law and on this ground the demurrer was properly sustained.

The judgment of the Circuit Court of Lee County, Alabama, sustained the demurrer and did not specify the grounds upon which it was sustained:

> "A demurrer is an entity and if any ground is well taken the action of the trial court in sustaining the demurrer must be upheld." *Prather v. Ray*, 61 So. 2d. 46, 258 Ala. 106; *Rudder v. Trice*, 182 So. 22, 236 Ala. 234; *Fife v. Pioneer Lumber Company*, 185 So. 759, 237 Ala. 92.

The judgment of the Trial Court might well have been sustained by the Court of Appeals of Alabama on this ground alone.

The Supreme Court of Alabama has repeatedly held that there is a presumption that the acts and ordinances of a legislative body are reasonable and valid and that the burden is upon one who assails such acts or ordinances to overcome this presumption. *American Bakeries v. City of Huntsville*, 168 So. 880-883, 232 Ala. 612; *City of Troy v. Western Union Telegraph Co.*, 51 So. 523, 164 Ala. 482, 27 L. R. A. 627; *Van Hook v. City of Selma*, 70 Ala. 361.

A corollary of this rule is that a complaint attacking the license ordinance must aver the facts to support the conclusion of the pleader. The allegation of discrimination is a conclusion of the pleader and is fatally defective on demurrer for failure to allege the facts to support the conclusion. *Southern Liquid Gas Co., v. City of Dothan*, 44 So. 2d. 744, 253 Ala. 350; *American Bakeries Co. v. City of Huntsville*, 168 So. 880, 232 Ala. 612.

Grounds 4, 5 and 6 of the demurrer presented this question of pleading and were sustained in the Lower Court and in the Court of Appeals of Alabama. The question of whether the ordinance is discriminatory is a question of fact and this question of fact has not been passed upon by the Court below. The Court below has only determined the question of pleading in accordance with the laws of practice and procedure in the State of Alabama. We quote from the dissenting opinion in *Nippert v. City of Richmond*, 327 U. S. 416, 66 S. Ct. 596, as follows:

"I think that one who complains that a state tax, though not discriminatory on its face, discriminates against interstate commerce in its actual operation should be required to come forward with proof to sustain the charge. See *Southern Railway Co. v. King*, 217 U. S. 524, 534-537, 30 S. Ct. 594, 596, 597, 54 L. Ed. 868. This does not, of course, require proof of the obvious. But as Mr. Justice Brandeis pointed out, cases of this type should not be decided on the basis of speculation; the special facts and circumstances will often be decisive. *City of Hammond v. Schappi Bus Line*, 275 U. S. 164, 170-172, 48 S. Ct. 66, 68, 69, 72 L. Ed. 218. Without evidence and findings we frequently can have no 'sure basis' for the informed judgment that is necessary for decision. *Terminal Railroad Assoc. v. Brotherhood*, 318, U. S. 1, 8, 63 S. Ct. 420, 424, 87 L. Ed. 571."

3. Whether one classification for wholesale grocers and another classification for other wholesalers for license tax purposes is a discrimination in violation of the Equal Protection and Due Process Clauses of the Constitution, was not properly raised or expressly passed on in the Court below.

The pleadings do not allege facts showing that the classification of wholesale grocers in one category and the classification of other wholesalers in a different category constitutes an unreasonable classification rendering the ordinance invalid. Under Title 37, Section 735, of the Alabama Code of 1940, the power is conferred on municipal corporations to license business, trades and professions in the exercise of the police power as well as for the purpose of raising revenue, either or both. This necessarily permits the classification of va-

rious businesses for license tax purposes. The exercise of the police power is obvious and justifies the classification. A wholesale grocer deals with food for human beings, with incident health and sanitary regulation under the police power. The provisions of the ordinance apply to every itinerant or transient wholesale grocer and in this respect there is no discrimination or inequality. It is well settled that a schedule of licenses may prescribe different license taxes for different types of businesses and professions. *American Bakeries Company v. City of Huntsville, supra; City of Montgomery v. Kelly*, 142 Ala. 552, 38 So. 67; *Dozier v. State*, 46 So. 9, 154 Ala. 83; *Phoenix Carpet Co. v. State*, 22 So. 627; *American Bakeries Co. v. City of Opelika*, 157 So. 206, 229 Ala. 388.

Here again, the question of pleading is presented. The burden rests with the Appellant to allege in its complaint facts showing that the classification is discriminatory. No such facts are alleged and the demurrer was properly sustained to this aspect of the complaint. The allegation of discrimination is a conclusion of the pleader and the Court below has not passed upon the question of fact here sought to be presented.

CONCLUSION

Appellee respectfully submits that the power of a State to levy a valid tax on goods shipped in interstate commerce, at the point of delivery, has been clearly, expressly and finally determined by the decisions of this Court, and, hence, no substantial Federal question is presented as to this aspect of the appeal. The Courts below have not determined as a matter of fact that the license tax either violates or does not violate the Com-

merce, Equal Protection and Due Process Clauses of the Constitution. The Courts below have only passed on and decided the question of pleadings presented by the complaint and the demurrer thereto and have not expressly passed on the matters of fact which determine the validity of the license tax in question. We respectfully submit that the appeal should be dismissed.

Lawrence K. Andrews

Attorney for Appellee.

Lawrence K. Andrews,
American National Bank Building,
Union Springs, Alabama.

PROOF OF SERVICE

I, Lawrence K. Andrews, Counsel of Record for the Appellee, City of Opelika, Alabama, hereby certify that I have served a copy of the foregoing Motion to Dismiss on the Honorable M. R. Schlesinger, 1700 N. B. C. Building, Cleveland, Ohio, Counsel of Record for the Appellant, by depositing a copy of the same in the United States Postoffice at Union Springs, Alabama, first class mail, with postage prepaid, addressed to him at his said Postoffice address.

Witness my hand this the 23 day of October, 1956.

Lawrence K. Andrews

Counsel of Record for Appellee

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IN THE SUPREME COURT OF THE
UNITED STATES

OCTOBER TERM, 1956

NO. 478

WEST POINT WHOLESALE GROCERY
COMPANY,

APPELLANT,

VS.

THE CITY OF OPELIKA, ALABAMA,

APPELLEE.

APPEAL FROM THE COURT OF APPEALS
OF ALABAMA

BRIEF ON THE MERITS.

STATEMENT OF THE CASE

There is no error in the Statement of the Case contained in the Appellant's Brief and further statement will not be here made. The Appellee is satisfied with the reference to official reports, statement of jurisdictional grounds, constitutional provisions and ordinances involved, and the grounds presented, as set forth in Appellant's Brief.

SUMMARY OF ARGUMENT

I

The Opelika Ordinance under review—Section 130 (a) of Ordinance No. 101-53, as amended by Ordinance No. 103-53, is a tax levied on the local incident of delivery and hence the same does not violate the Commerce Clause of the Constitution of the United States. There is no prohibition against a flat sum license levied on the local incident of delivery. *McGoldrick v. Berwind-White Coal Mining Co.*, 309 U. S. 33, 60 S. Ct. 388, 84 L. Ed. 565.

II

Under the laws of Alabama the City of Opelika has the power to classify businesses for license purposes. The classification made in Ordinance No. 130(a) is not inherently discriminatory and has a reasonable basis. The burden rested on the Appellant to allege in its complaint facts showing such a discrimination and the complaint fails so to do and demurrers were properly sustained to the same.

Title 37, Section 735, Alabama Code of 1940
American Bakeries Co. v. City of Opelika, 229 Ala. 388, 157 So. 206

American Bakeries Co. et al v. City of Huntsville, 232 Ala. 612, 168 So. 880, appeal dismissed *American Bakeries Co. v. City of Huntsville*, 57 S. Ct. 122, 299 U. S. 514, 81 L. Ed. 380

City of Roanoke v. Robertson, 30 Ala. App. 1, 200 So. 437, Cert. denied 200 So. 439

City of Enterprise v. Fleming, 240 Ala. 460, 199 So. 691

Woco Pep Co. of Montgomery v. City of Montgomery, 219 Ala. 73, 121 So. 64

Edgil v. City of Carbon Hill, 214 Ala. 532, 108 So. 355

Town of Guntersville v. Wright, 223 Ala. 349, 135 So. 634

Sanford v. City of Clanton, 31 Ala. App. 253, 15 So. 2d 303, Cert. denied 244 Ala. 671, 15 So. 2d 309

State v. Coca-Cola Bottling Works, 29 Ala. App. 508, 198 So. 363

Sanford v. City of Andalusia, 256 Ala. 507, 55 So. 2d 856

State v. Cater, 184 Iowa 667, 169 N. W. 43

City of Troy v. Western Union Telegraph Co., 51 So. 523, 164 Ala. 482, 27 L. R. A. 627

Van Hook v. City of Selma, 70 Ala. 361

Southern Liquid Gas Co. v. City of Dothan, 44 So. 2d. 744, 253 Ala. 350.

ARGUMENT

I

The Opelika license ordinance is levied on the incident of delivery and does not violate the Commerce Clause of the Constitution. Section 130(a) of the Ordinance levies a license on any firm, person or corporation, who unloads, delivers, distributes or disposes of groceries at wholesale in the City of Opelika. This is clearly a tax on the incident of delivery and not upon goods shipped in interstate shipment. The legality of a tax on the incident of delivery has been conclusively decided in the case of *McGoldrick v. Berwind-White Coal Mining Co.*, supra.

The cases of *Nippert v. City of Richmond*, 327 U. S. 416, *Memphis Steam Laundry Cleaners, Inc. v. Stone*, 342 U. S. 389, and *Robbins v. Shelby County Taxing District*, 120 U. S. 489, are not in point. In each of these cases a license was levied on the solicitation of sales to be later consummated by delivery in interstate commerce. We challenge the statement that this Court has consistently held that all flat sum licenses are discriminatory in operation against interstate commerce. In the McGoldrick case, supra, it was pointed out:

> "The rule of *Robbins v. Shelby County Taxing District*, supra, has been narrowly limited to fixed sum license taxes imposed on the business of soliciting orders for the purchase of goods to be shipped interstate."

This Court has never said that there is any impropriety in the levy of a flat sum license on the incident of delivery. The complaint is here made that such a tax could be levied in any municipality in which wholesale groceries are delivered. This identical complaint

was reviewed in detail in the McGoldrick case, supra, and in that case the Court held that this was not sufficient to invalidate the tax.

II

The power to license trade, businesses and professions is granted Alabama municipalities by Section 735 of Title 37, of the Alabama Code of 1940. The final section of this statute reads as follows:

> "The power to license conferred by this article may be used in the exercise of the police power as well as for the purpose of raising revenue, one or both."

The power to license necessarily carries with it the power to classify businesses for license purposes both from the standpoint of the exercise of the police power and for revenue. In the instant case the license classifies wholesale grocers delivering groceries from a point without the city to a point within the city, in one category, and wholesale grocers within the city, in another category. The question thus presented is whether this is a reasonable classification.

If it is a reasonable classification the ordinance is valid, and if unreasonable the same is discriminatory.

In a long line of cases the Supreme Court of Alabama has held that a schedule of licenses may be prescribed for itinerant persons, firms or corporations, different from that prescribed for one having an established place of business in the city, and that such a classification has a reasonable basis and is not inherently discriminatory.

American Bakeries Co. v. City of Opelika, 229 Ala. 388, 157 So. 206

American Bakeries Co. et al v. City of Huntsville, 232 Ala. 612, 168 So. 880, appeal dismissed *American Bakeries Co. v. City of Huntsville*, 57 S. Ct. 122, 299 U. S. 514, 81 L. Ed. 380.

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Town of Guntersville v. Wright, 223 Ala. 349, 135 So. 634

Sanford v. City of Clanton, 31 Ala. App. 253, 15 So. 2d 303, Cert. denied 244 Ala. 671, 15 So. 2d 309

State v. Coca-Cola Bottling Works, 29 Ala. App. 508, 198 So. 363

State v. Cater, 194 Iowa 667, 169 N. W. 43.

The reasonable basis for this classification is aptly stated in *State v. Cater*, supra, as follows:

> "The usual justification offered for the imposition of a license upon transient merchants is to insure proper contribution from such merchants for police protection and to protect local dealers against unfair competition by transient dealers who come and go so quickly as to escape their share of general taxation in the community, and it may be admitted that the reasons so advanced are sound

and that reasonable license fees so exacted can well be upheld."

The necessity for such a classification by the municipalities in the exercise of their police power is obvious. Itinerant merchants are constantly offering goods for sale. They have no fixed place of business and are here today and are gone tomorrow. They have no financial responsibility to protect the purchaser. Often the goods sold are inferior in quality and the sales are based on fraud and misrepresentation. As a part of its police power the municipalities must exercise its licensing power for the protection of the public. We make no intimation that the Appellant in this case falls in this category but this license is applicable to all itinerant and transient wholesale grocers.

In the *American Bakeries Co. v. City of Huntsville*, supra, the Supreme Court of Alabama held as follows:

> "The provision of the ordinance in question applying to itinerant dealers is aimed and leveled at every person and every class who undertake to carry on the business of an itinerant dealer, trader, or seller of the products enumerated in the license schedule. *In this respect there is no discrimination or inequality, but perfect equality and uniformity.* Such being the case, we do not see that it conflicts in any way with the Federal Constitution. (citing *Dozier v. State*, 154 Ala. 83, 46 So. 9, 129 Am. State Rep. 51). *Equality and uniformity consist in the imposition of a like tax upon all who engage in the avocation, or who may exercise the privilege, taxed.* There is nothing in the ordinance imposing a license tax on itinerants (*which comprehends citizens of this State as well as citizens of other states*) which in the remotest

degree abridges the privileges and immunities of citizens of other states in favor of any resident class.

We wish to emphasize that the classification is not inherently discriminatory. Under Alabama practice and procedure it was necessary for the Appellant's complaint to allege the facts constituting a discrimination. The mere allegation that the ordinance is discriminatory is a conclusion of the pleader and is not admitted by the demurrer.

American Bakeries v. City of Huntsville, 168 So. 880-883, 232 Ala. 612

City of Troy v. Western Union Telegraph Co., 51 So. 523, 164 Ala. 482

27 L. R. A. 627

Van Hook v. City of Selma, 70 Ala. 361

Southern Liquid Gas Co. v. City of Dothan, 44 So. 2d. 744, 253 Ala. 350

Nippert v. City of Richmond, 327 U. S. 416, 66 S. Ct. 596

The case was decided in the Lower Court on the demurrers which tested the legal sufficiency of the complaint. The facts were not considered. The demurrer was properly sustained because there were no facts alleged in the complaint to overcome the presumption of the validity of the ordinance. We quote from the dissenting opinion in *Nippert v. City of Richmond*, supra, as follows:

"I think that one who complains that a state tax, though not discriminatory on its face, discriminates against interstate commerce in its actu-

al operation should be required to come forward with proof to sustain the charge. See *Southern Railway Co. v. King*, 217 U. S. 524, 534-537, 30 S. Ct. 594, 596, 597, 54 L. Ed. 868. This does not, of course, require proof of the obvious. But as Mr. Justice Brandeis pointed out, cases of this type should not be decided on the basis of speculation; the special facts and circumstances will often be decisive. *City of Hammond v. Schappi Bus Line*, 275 U. S. 164, 170-172, 48 S. Ct. 66, 68, 69, 72 L. Ed. 218. Without evidence and findings we frequently can have no 'sure basis' for the informed judgment that is necessary for decision. *Terminal Railroad Assoc. v. Brotherhood*, 318 U. S. 1, 8, 63 S. Ct. 420, 424, 87 L. Ed. 571."

CONCLUSION

Section 130(a) of the Ordinance of the City of Opelika levies a license on the local incident of delivery and hence it does not violate the Commerce Clause of the Constitution. Under their police powers, municipalities have a broad discretionary power to classify trades, businesses and professions for license tax purposes. A classification by a municipality is presumptively valid and the burden rests on the party challenging the validity of such classification to allege and prove facts showing that the classification is discriminatory. The classification by the City of Opelika, as set forth in Section 130(a) of the ordinance is presumptively a valid classification based on a legal exercise of its police powers. The appellant's original bill of complaint did not allege any facts showing or tending to show that this classification was discriminatory and hence the demurrers to the complaint were properly sustained.

The Appellee respectfully submits that the judgment of the Lower Court should be sustained.

Respectfully submitted,

Lawrence K. Andrews,
Attorney for Appellee.

Lawrence K. Andrews,
American National Bank Building,
Union Springs, Alabama.

PROOF OF SERVICE

I, Lawrence K. Andrews, Counsel of Record for the Appellee, City of Opelika, Alabama, hereby certify that I have served a copy of the foregoing Brief on the Merits on the Honorable M. R. Schlesinger, 1700 N. B. C. Building, Cleveland, Ohio, Counsel of Record for the Appellant, by depositing a copy of the same in the United States Postoffice at Union Springs, Alabama, first class mail, with postage prepaid, addressed to him at his said postoffice address.

Witness my hand this the 9 day of April, 1957.

Lawrence K. Andrews
Counsel of Record for Appellee